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RAILROAD REPORTS

(Vol. 67 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES

EDITED BY

THOMAS J. MICHIE

ST. LOUIS : 1913.

VOLUME XLIV.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.

1913.

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RAILROAD REPORTS

WILENSKY *v.* CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Sept. 26, 1911.)

[72 S. E. Rep. 418.]

Carriers—Transportation of Goods—Action for Breach of Contract.*

—A shipper, who is both consignor and consignee, cannot maintain against a carrier an action ex contractu for the value of goods consigned to the carrier for shipment and not delivered, when the carrier tenders the goods at destination in a damaged condition, but refuses to deliver them unless the shipper pays the usual freight charges, notwithstanding the damages to the goods amount to more than the freight charges, and the shipper demands that the damages to the shipment be offset against the freight bill, on the theory that the refusal to deliver under the circumstances is a breach of the contract of carriage.

(Syllabus by the Court.)

Certified Question from Court of Appeals.

Action by H. Wilensky against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Question certified by Court of Appeals to Supreme Court. Answered in favor of defendant in error.

Jesse M. Wood, for plaintiff in error.

Payne, Little & Jones and *M. F. Goldstein*, for defendant in error.

FISH, C. J. The Court of Appeals has certified to the Supreme Court the following question:

"Can a shipper, who is both consignor and consignee, maintain against a carrier an action ex contractu for the value of goods consigned to the carrier for shipment and not delivered, when the carrier tenders the goods at destination in a damaged condition, but refuses to deliver them unless the shipper pays the usual freight charges, notwithstanding the damages to the goods amount to more than the freight charges, and the shipper demands that

*For the authorities in this series on the right of a consignee to refuse to accept delivery by carrier of delayed or damaged freight, see second foot-note of *Chicago, etc., Ry. Co. v. Pfeifer & Bro.* (Ark.), 32 R. R. R. 434, 55 Am. & Eng. R. Cas., N. S., 434, where all the preceding authorities on the subject in this series are collected.

For the authorities in this series on the subject of a common carrier's lien on goods for its freight charges, see extensive note, 22 R. R. R. 247, 45 Am. & Eng. R. Cas., N. S., 247; *Atchison, etc., Ry. Co. v. Bourdett* (Kan.), 27 R. R. R. 321, 50 Am. & Eng. R. Cas., N. S., 321; *Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co.* (Kan.), 25 R. R. R. 155, 48 Am. & Eng. R. Cas., N. S., 155.

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the damages to the shipment be offset against the freight bill, on the theory that the refusal to deliver under the circumstances is a breach of the contract of carriage?"

In *Brown, Shipley & Co. v. Clayton*, 12 Ga. 564 (6), this court held that "a consignee cannot abandon damaged goods, and thereby discharge the liability of the shipper for freight." The point was directly involved in that case, and was learnedly and exhaustively treated by Nisbet, J., who pronounced the opinion of the court. He said: "It has been much mooted whether, when the goods became greatly deteriorated on the voyage, the consignee is bound to take them and pay the freight, or whether he may not abandon them to the master in discharge of the freight. The better opinion is that he cannot abandon the goods and thereby discharge the freight." The following authorities were cited: 3 Kent's Com. 224, 225; 3 Johns. R. 321; 1 Bell's Com. 570; 1 Story's R. 342, 353, 354; Pothier Charte Partic. No. 59. I quote further extracts from the opinion as follows: "The * * * law allows to the carrier his freight when the goods are delivered, irrespective of damage. * * * If the carrier and the owners [of the ship] are liable for damage, the shipper and his consignee must resort to their action to recover them. * * * This obligation to pay freight grows out of the contract. It is entire, and cannot be apportioned. Upon a bill of lading like this, in which freight is agreed to be paid upon delivery, a delivery is a condition precedent to a right to it, and upon delivery or tender the freight is earned, and the shipper is liable for it. The carrier may retain the goods if it is not paid, or he may waive that and rely upon the liability of both the consignee and the shipper (if the shipper is also the owner) for his freight."

It is the contention of counsel for the shipper, who is also the owner, in the case now under consideration, that the doctrine announced in the case in 12 Ga. 564, above cited, was overturned by the adoption by the General Assembly of Civil Code 1895, § 2287, which is as follows: "The carrier has a lien on the goods for his freight, and may retain possession until it is paid, unless this right is waived by special contract or actual delivery. This lien exists only when the carrier has complied with his contract as to transportation." The decision in *Brown v. Clayton*, 12 Ga. 564, was rendered in 1853, prior to the adoption of any Civil Code in this state. By an act of the General Assembly approved December 9, 1858, provision was made for the election of three commissioners "to prepare for the people of Georgia a Code, which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the Constitution, the statutes of the state, the decisions of the Supreme Court, or the statutes of England, of force in this state." Laws 1858, p. 95. The Code prepared by the commissioners was adopted by an act of the General Assembly approved

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December 19, 1860 (Laws 1860, p. 24); but, by an act of 1861 (Laws 1861, p. 28) it did not go into effect until January 1, 1863. That Code contained a section (section 2049) in the identical language of section 2287 of the Code of 1895, and each of the intermediate Codes has contained a section with similar provisions. Section 2741 of the Civil Code of 1910 is the same as section 2287 of the Civil Code of 1895. This section did not have its origin in a statute of this state. It appears for the first time in the Code of 1863. It has, however, all the binding effect of an original act of the Legislature, because of the adoption by the Legislature of the Code wherein it appears. *Central Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518. It has been several times held by this court that a section of the Code, not of original statutory origin, would be construed merely as a codification of the existing law, unless there be words in the section which manifestly demand a construction which would change the rule in force at the time the Code was adopted. *Brandon v. Pritchett*, 126 Ga. 286, 55 S. E. 241; *Mitchell v. Georgia & Alabama Ry.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622, and cases cited.

At the time of the adoption of the Code of 1863, the law on the subject now under discussion was "that a consignee cannot abandon damaged goods, and thereby discharge the liability of the shipper for freight," as has been decided by the Supreme Court in *Brown v. Clayton*, 12 Ga. 564, and one of the sources from which the commissioners appointed to prepare a code of the laws of this state were to seek the existing law was "the decisions of the Supreme Court." Are there any words in the section of the Code now under consideration which manifestly demand the conclusion that the codifiers intended to change the law as it previously existed? There is nothing in the section by which it can be contended that the doctrine announced in 12 Ga. 564, was changed, unless it be the following language: "This lien exists only when the carrier has complied with his contract as to transportation." It certainly cannot be successfully urged that it was ever at any time held that the carrier could not retain goods transported by it until the usual freight charges thereon should be paid. It is contended, in effect, that as the duty of the common carrier is to transport goods received for carriage safely and within a reasonable time, and as this duty, being imposed by law, becomes a part of the contract of carriage, even though not expressed therein, it follows that, if the goods have been damaged by the fault of the carrier before reaching their destination, then the carrier has not complied with his contract as to transportation, and no lien exists on the goods for freight. If this be true, then the carrier would have no lien for freight on the goods if they should be injured in transportation by the carrier's fault to any appreciable extent, as the contract to safely transport, in

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such a case, would not have been complied with. Now, how can it be logically contended that a carrier has a lien on goods transported which have been damaged by the carrier's fault in transit, when the freight on the goods amounts to more than the damage, but has no lien where the damage amounts to more than the freight? Could it be successfully urged, where the freight amounted to \$100 and the damage by the carrier to the goods amounted to \$99, that the carrier would have a lien for the entire freight, but, if the damage amounted to \$101, then no lien would exist? As was ruled in *Brown v. Clayton*, 12 Ga. 575, 576: When the goods become greatly deteriorated on the voyage, the consignee is bound to take them and to pay the freight. "He cannot abandon the goods and thereby discharge the freight. * * * This obligation to pay freight grows out of the contract. It is entire, and cannot be apportioned."

Code, 1863, § 2045, declared that "the common carrier is bound not only for the safe transportation and delivery of goods, but also that the same be done without unreasonable delay;" and this section has been embodied in all the subsequent Codes. Therefore it is as much the duty of such carrier to transport goods without unreasonable delay as it is to safely transport them, and, as we have said, both of these duties being imposed by law, they became by implication a part of the contract of carriage. Civil Code 1895, § 2319 (Civil Code 1910, § 2773), is in this language: "Where a carrier fails to deliver goods in a reasonable time, the measure of damages is the difference between the market value at the time and place they should have been delivered and the time of actual delivery." This section is a codification of the rulings of this court in *Columbus & Western Railway v. Flournoy*, 75 Ga. 745, *Atlanta, etc., R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600, and *East Tennessee R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809, wherein it was decided what damages are recoverable against a common carrier for the breach of the contract of carriage in failing to deliver goods within a reasonable time. This measure of damages by delay is exclusive. If the delivery of goods has been unreasonably delayed by the carrier, the owner must sue for the damage prescribed in this section of the Code. He may not abandon the goods and sue for their value. The title to the goods in such a case remains in the owner. Mere delay in delivery does not amount to a conversion by the carrier. Where the goods have been merely damaged, and not destroyed or lost, by the fault of the carrier in transportation, and their identity has not been substantially destroyed, why does not the title to them still remain in the owner? How can such damage amount to a conversion of the goods by the carrier? Why can he abandon them in such a case and sue the carrier for their value, when he could not do so if damage had occurred to him by unreasonable delay in the delivery of the

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goods? If he must accept the goods when tendered and pay the freight when he has been damaged by an unreasonable delay in their delivery, why should he not be required to do the same thing when he has been damaged by injury to the goods caused by the fault of the carrier in transportation? No satisfactory reason occurs to us for making a distinction in the respects indicated between the two cases. Of course I do not mean to hold that the same rule as to the measure of damages is applicable to the two cases; but what we urge is that, as the Code fixes the measure of damages in case of delay, no action will lie in such a case for the value of the goods, and that unreasonable delay in transportation and delivery is as much a breach of the contract of carriage as damage in transit, and that there can be no valid reason for allowing the owner to abandon the goods in the latter case and sue for their value, when the damage is more than the freight, when he cannot do this in the former case.

The section of the Code declaring that the carrier has a lien on the goods for the freight, and may retain the possession until it is paid, unless this right be waived, and that this lien exists only when the carrier has complied with his contract as to transportation, has never been directly construed by this court since its insertion in the first Code. In *Breed v. Mitchell*, 48 Ga. 533, it was held that "where goods arrive at their point of destination, and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they cannot be handled without loss or further damage, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them; and if he refuses to do this the owner may refuse to receive the goods and may recover the value, and this without offering to pay the freights, since the carrier has not completed his undertaking." In the opinion, which was delivered by McCay, J., it was said that "if a carrier has, by his fault, so injured the cask in which a liquid is contained as that it cannot be moved without further damage, [then] he cannot compel the owner to take it in that condition. It is practically a total loss. If left as the carrier has by his fault made it, the loss will be total. This is not like the case of rotting goods, or even of damaged goods. Here the parties have provided a safe barrel to hold their oil, and the carrier has damaged that barrel so that to move it will cause the loss of the oil. It is capable of repair. * * * As the carrier in this case had something more to do, the freight was not demandable." Here there is a clear intimation that where the goods shipped are not practically or totally lost on account of the fault of the carrier, but that they have been merely damaged, the freight, upon the tender of the goods to the owner, would be demandable.

In *Robinson v. Dover, etc., R. Co.*, 99 Ga. 480, 27 S. E. 713, there was one shipment of two carboys of acid. One of them was

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lost, and the railroad company refused to deliver the other until the freight should be paid on both. It appears from the record in that case on file in this court that the freight on both carboys amounted to \$2.90, and that the value of each carboy was \$3, so that the damage by the loss of one carboy was more than the freight on both; yet it was said: "Upon the carboy of sulphuric acid actually delivered the carrier was entitled to a lien for the amount of freight charges due, but the lien for freight charges attaches only to the goods upon which the freight is actually due. The consignee tendered the amount of freight charges upon the article of freight actually transported by the defendant, and was therefore entitled to receive it; and inasmuch as no lien for freight due upon other goods attached to the specific article demanded, it could not lawfully withhold from the consignee the possession of such article. * * * As to the carboy lost, neither it nor the connecting line had completed the contract of carriage, and therefore no lien for freight could arise in favor of either company against the consignee for charges upon the goods which were lost." While the carrier has no lien for freight on goods lost in transportation, for the obvious reason that in such a case the contract of carriage was never completed, a different question arises when goods shipped have not been lost, but merely damaged, and delivery is tendered to the owner in a damaged condition. As this court, in *Breed v. Mitchell* and in *Robinson v. Dover, etc., R. Co.*, supra, has clearly intimated that there is a difference as to the right of a carrier to demand freight on lost goods and goods merely damaged, and as it was held in several decisions of this court, after the codification of the section declaring that the "lien exists only when the carrier has complied with his contract as to transportation," that the measure of damages for delay in transportation and delivery was the difference in the value of the goods at their destination when they should have been delivered and when they were actually delivered, which decisions were subsequently codified, and as there can be no good reason for a rule that would not allow the owner to sue for the value of the goods when he has been damaged by delay in their delivery, but would give him the right to sue for their value when they had been damaged in transit by the carrier's fault, I have reached the conclusion that the section of the Code first appearing as section 2049 in the Code of 1863, containing the language last above quoted, and which has been embodied in all subsequent Civil Codes, was merely a codification of the then existing law as it had been declared by the decision of the Supreme Court in *Brown v. Clayton*, 12 Ga. 564, since, for the reasons above stated, there is nothing in the section which manifestly demands a construction that would change the rule in force at the time that Code was adopted. It follows, therefore,

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that where property is injured in transportation through the negligence of the carrier, but the substantial identity of the property has not been destroyed by the damage, the owner, upon the tender of the property at its destination by the carrier, cannot decline to pay the usual freight charges, refuse to accept the property, and sue for its value, though the damage may amount to more than the freight. Many good reasons occur to me in support of the soundness of this rule, but I deem it unnecessary to state them, as I am satisfied to rest my conclusion upon the decision of this court in *Brown v. Clayton*, supra, where it was stated that, while it was a much-mooted question, it was decided that the better opinion is that the consignee is bound to take the goods, though deteriorated on the voyage, and pay the freight, and that he could not abandon them to the carrier in discharge of the freight.

Counsel for the consignor, who is also the consignee, ask leave, in the event that the doctrine announced in *Brown v. Clayton*, 12 Ga. 564, was not changed by section 2049 of the Code of 1863, that such case be reviewed and overruled. After an examination of all the authorities I have been able to find on the subject, I am of the opinion that the correct rule was stated in that case, and that it should not be disturbed. The same rule prevails in England, as well as in some of the states of this Union. In 3 *Hutchinson on Carriers* (3d Ed.) § 1365, it is said: "As a general rule, the doctrine that, where goods are injured, the owner may abandon them as for a total loss and sue for their value, does not apply to contracts of affreightment [citing *Silverman v. Railway*, 51 La. Ann. 1785, 26 South. 447]. The fact, therefore, that the goods are injured upon the journey, through causes for which the carrier is responsible, does not in itself justify the consignee in refusing to receive them; but he must accept them and hold the carrier responsible for the injury [citing *Corso v. N. O., etc., R. Co.*, 48 La. Ann. 1286, 20 South. 752; *Brand v. Weir*, 27 Misc. Rep. 212, 57 N. Y. Supp. 731; *Gulf, etc., Ry. Co. v. Pitts*, 37 Tex. Civ. App. 212, 83 S. W. 727; *Gulf, etc., Ry. Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257]. Wherever, however, the damage is such that the entire value of the goods is destroyed, the consignee may refuse to receive them and sue the carrier for their value."

From what I have said, the question certified to this court by the Court of Appeals is answered in the negative. I am authorized to say that ATKINSON, J., concurs in the foregoing opinion.

BECKMAN v. SOUTHERN PAC. CO.

(Supreme Court of Utah, Sept. 22, 1911.)

[118 Pac. Rep. 118.]

Carriers—Carriers of Live Stock—Duty as to Food, Water, and Rest—Statutory Provisions.—Under 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), which provides that every railroad company carrying an interstate shipment of live stock shall, at intervals, of not less than 28 hours, unload it into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or other accident or unavoidable cause which cannot be averted by due diligence, the carrier is not made an absolute insurer of the safety of sheep in transit, but its duty is fully performed by providing pens properly equipped, unless it has notice, or by reasonable diligence could have discovered, that the surrounding conditions were such that injury to the sheep, while in the pens, from dogs or wild animals, might be expected, in which case it would be bound to make reasonable provision for their safety.

Carriers—Carriers of Live Stock—Action—Burden of Proof.—In an action for injury to an interstate shipment of sheep while in pens for rest, water, and feeding, by dogs or wild animals, which broke into the pens and killed and worried the sheep, held, that the shipper had not sustained the burden of proving that the carrier, in providing the pens for such purposes, as required by 34 Stat. 607 (U. S. Compt. St. Supp. 1909, p. 1178), was negligent in not protecting the sheep from such injury.

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by William Beckman against Southern Pacific Company. From a directed verdict for defendant, plaintiff appeals. Affirmed.

H. H. Henderson, for appellant.

P. L. Williams, *Geo. H. Smith*, and *Frank K. Knebeker*, for respondent.

FRICK, C. J. This was an action for damages for injury to sheep at Reno, Nev., while in transit from Ogden, Utah, to San Francisco, Cal.

The material allegations respecting respondent's delict are as follows: "That the defendant, disregarding its duty to provide proper, safe, adequate, and sufficient stockyards, carelessly and negligently furnished unsafe, broken down, and inadequate stockyards, and carelessly and negligently failed to provide a

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guard or watchman for said stockyards, so that, by reason of the carelessness and negligence of the defendant aforesaid, during the nights of March 1st and 2d, dogs or wild animals broke into said stockyards, and chased, tore, and mangled said sheep, so that 87 of said sheep were killed in said stockyards, and that 7 others were so badly torn and mangled that they died soon thereafter, to plaintiff's damage in the sum of \$644.85." It is further alleged that the rest of the sheep, to wit, 1,617 head, were chased and worried by said dogs or wild animals, so that they lost in flesh and depreciated in value.

In answering, respondent admitted that it had received certain lambs at Ogden, Utah, for transportation, and had transported them to San Francisco. Respondent set up various defenses in its answer, one of which was that the lambs were received by it and were transported under a special contract, in writing, duly entered into and executed by appellant and respondent. The portions of the contract especially relied on by respondent are as follows: "Now, therefore, second party, for and in consideration of the premises and the rates hereinbefore named, and the service to be performed hereunder, and other good and sufficient considerations (in case of car load shipment carriage of man or men in charge at reduced rates, or free, as rules may provide) hereby agrees to *load said live stock at point of shipment, unload and reload at resting places, and unload at destination, and to feed and water at his expense, and to accompany and attend said live stock en route and to destination.* * * * It is further understood and agreed by second party that the live stock covered by this special agreement is to be transported subject to the conditions of state, territorial or federal laws governing the transportation, unloading and resting of live stock en route; and in case first party should, through its employees, furnish aid to assist in loading, caring for en route, unloading or transferring said live stock, said employees of first party so assisting or performing services shall be subject to the orders and deemed the employees of second party while so engaged, and not in any sense the agents of first party; and when live stock is in corrals at shipping point, resting place or destination, it shall be at owner's risk of loss or damage through breaking out of corrals or in loading and unloading." The italicized part of the foregoing contract is printed in bold-faced type.

Basing its answer on the foregoing provisions in the contract, respondent also averred that at the time the lambs were injured they were in appellant's care, custody, and control, and that it was his duty to protect them from injury, and averred that he was guilty of negligence causing or directly contributing to the injury; and for further answer respondent denied all negligence on its part. Appellant in his reply denied all the averments

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contained in the answer, except that the lambs were shipped pursuant to the contract referred to by respondent.

In order that we may have a clearer conception of the precise claim appellant makes in this case, we copy from the transcript of the proceedings had in the court below. When the court asked Mr. Henderson, one of appellant's counsel, upon what specific ground he relied for a recovery, Mr. Henderson answered thus: "Upon the ground that they [respondent] didn't have adequate fences or yards, and they didn't have any guard." Then the record discloses the following conversation between court and counsel: "The Court: You mean adequate in that particular, that animals or dogs got through? Mr. Henderson: Yes. The Court: That is to say, if the court should hold as a matter of law that the railroad company is not under any duty to furnish a fence that would keep dogs out or wild animals, and should also hold that it was not required to have a watchman, that settles the case? Mr. Henderson: That's all I rely on. That's all I have got to rely on." It seems that both the appellant and respondent limited the evidence to the issues outlined above. After the evidence was all submitted by both sides, respondent moved for a directed verdict upon various grounds, which, in view that their sufficiency is not assailed, we deem unnecessary to state in full. The court granted the motion and directed the jury to return a verdict for respondent, to all of which appellant duly excepted.

The principal error assigned is that the court erred in directing a verdict for respondent.

The shipment in question constituted an interstate shipment of live stock, and such shipments are controlled by the following provisions: "That no railroad company * * * whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one state or territory * * * into or through another state or territory * * * shall confine the same in cars, boats or vessels of any description for a period longer than twenty-eight consecutive hours, without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided, by the exercise of due diligence and foresight." The foregoing quotation constitutes the material part of Pierce's U. S. Code, 1910, § 6463, also found in part 1 of 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178).

The evidence with respect to what caused the injury to the lambs is, to say the least, quite unsatisfactory. The evidence is to the effect that the lambs arrived at Reno, Nev., on their way to San Francisco, on the 1st day of March, 1908, some time in the afternoon; that the lambs were unloaded there for rest

and to be fed and watered; that appellant unloaded or helped to unload them, and an employee of respondent directed them to be driven into certain corrals or pens made of wood, and from 3½ to 4 feet high; that respondent had other pens or yards which were about 10 or 12 feet high; that those "other yards which the defendant had were occupied by cattle and hogs." In speaking about the yards into which the lambs were placed, appellant, in his testimony, says: "I told the foreman of the yard—this man Lewis—that I wasn't satisfied with the security of the yard, and if there was any damage done I would make the company stand for it, and I called a witness to it. He said those were the only yards that were empty." One of appellant's witnesses, in his testimony, in speaking of appellant's objection referred to above, says: "One of the particulars that he [appellant] mentioned was that there was no locks on the gates; the gates were just simply thrown back and fastened with a wire; and he said that any Indian or Dago could help themselves to sheep for mutton if they wanted to." Mr. Lewis, to whom appellant referred in his testimony, said that appellant made some objection that the water had not been turned in—that is, turned in to flow into the yards where the lambs were; but as soon as the water was turned into the yard to where the lambs were appellant was satisfied. The sheep were fed and watered in the yard, and were in good condition at about 7 o'clock in the evening of March 1st, but when they were next seen on the following morning at about 7 or 7:30 o'clock 87 of them were dead, and were lying together in one corner of the fence. Some of the dead ones had considerable of their wool torn off, and some were more or less wounded and bruised, and appeared as though they had been bitten by some sharp-toothed animals. The rest of the sheep appeared tired out and "logy," and were in bad condition generally. The gates were closed. There was no evidence of any interference with the fence, and the lambs were all in the pen. It seems that no dogs or other wild animals were seen or heard by any one. This is the substance of the evidence relating to the condition of the yards, the injury to the lambs, and the inference as to how they were injured. No complaint is made that any of the lambs suffered injury by reason of any particular defect in the yards or fence, or that they were insufficient to retain the lambs, or that the yards were in an unfit or unclean condition, or that the lambs got out and were injured in that way. The only claims made by appellant are that the yards were insufficient, in that they did not keep out vicious dogs or wild animals; that it was the duty of respondent to furnish yards which would keep out vicious dogs or wild animals, or at least to provide a watchman or guard who would watch the sheep and prevent injury to them from such source.

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[1] The question therefore is, What is respondent's duty with respect to providing pens for the purpose of permitting shippers of live stock to feed, water, and rest such stock when it becomes necessary during transit? It will be observed that the statute to which we have directed attention does not in terms provide the kind or character of pens the carrier shall provide, except that the same must be "properly equipped pens for rest, water, and feeding." In the case of *United States v. St. Louis, I. M. & S. Ry. Co.*, 177 Fed. 205, 101 C. C. A. 375, the United States Court of Appeals for the Eighth Circuit, in considering the question with respect to the character of equipment which a carrier must provide in furnishing pens under the statute we have quoted, says: "It [the statute] contains no provision requiring the carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise. The condition of the pens seems to have concerned Congress in making the enactment so far, and so far only, as it served the dominant and humane purpose of properly feeding, watering, and resting the stock. The equipment of the pens must be such, and need be only such, as serves that purpose at the time the stock is unloaded into them."

In 2 Hutchinson on Carriers (3d Ed.) § 510, the author, in speaking of the carrier's duty with regard to the shipment of live stock, states the law clearly and tersely as follows: "In the case of a carrier of live stock, it includes the furnishing of proper yards, pens, gates, and other appliances necessary to enable the stock to be received, loaded, unloaded, and delivered to the consignee. In providing pens at any point, however, the carrier is only required to anticipate and make reasonable provision for the volume of live stock business which he ordinarily and usually transacts at such point. It is also his duty to keep the pens so furnished by him in a suitable condition for the purpose for which they are intended. Thus, if he should permit the pens to become so out of repair that the live stock placed within them break out and are injured, he will be liable to the shipper for such injury." A careful examination of a large number of cases convinces us that the author, in the foregoing excerpt, has stated the law upon the subject correctly and with admirable precision. Some of the cases are based upon state statutes, while others are based upon the common-law duties of the carrier. A large number of cases are collated by Mr. Hutchinson, and we refer the reader to his citations.

It seems to us that, unless respondent is by law required to keep live stock free from all harm while the same are being fed and watered, under the statute, while in transit, then, in view of the evidence in this case, respondent cannot be held liable, for the following reasons: There is no evidence whatever that

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there were any vicious dogs or wild animals of any kind in or near Reno which might or probably would molest the lambs in question. Reno is a city, as the evidence shows, of 15,000 inhabitants, and is an old established place. Under such circumstances, no one would expect that either vicious dogs or wild animals would abound in large or any considerable numbers, if at all. True it is claimed that vicious dogs or some wild animals did injure and kill some of the sheep; and hence there were such dogs or animals there. It seems to us, however, that the material inquiry is, What was the prevailing condition in or in the immediate vicinity of Reno with regard to the prevalence of vicious dogs or wild animals whose natural propensities would lead them to attack and injure sheep? It cannot be doubted that, had appellant made same attempt, he could have found at least some persons out of the 15,000 inhabitants of Reno who could have informed the court and jury with regard to such condition, or with regard to whether there had been similar previous occurrences at the yards at Reno. Had such evidence been produced, then, no doubt, the respondent, through its agents and representatives at Reno, would have been bound to take notice of the prevailing condition in that regard, and, as we think, would have been required by law to make reasonable provision to protect the sheep.

This conclusion is based upon the federal statute which we have quoted. The statute requires the respondent to furnish properly equipped pens; equipped to answer the following purposes: To afford rest, to provide means or facilities to water, and to feed stock. As we have seen, the pens in question were properly equipped to feed and water the sheep, and, as far as the evidence discloses, nothing is shown why they were not also inherently sufficient to afford the required rest. If the pens were not sufficient in that regard, it was because there were vicious dogs or some wild animals that broke into the pens during the nighttime, and chased, harrassed, worried, wounded, mutilated, and killed some of the sheep. If there were vicious dogs or wild animals in considerable numbers in or near the city of Reno, whose natural propensities were to injure sheep, and it was generally known that such animals and dogs were prevalent there, then any one could infer that they might and probably would break into the pens when occupied by sheep, and, if so, would chase, worry, and injure them. If such were the fact, then pens like those into which the sheep in question were unloaded at Reno were not sufficient, because not such as would afford proper rest for the sheep. So far as the evidence goes, however, it would seem that the occurrence at Reno was extraordinary. Is respondent required to meet every possible emergency that may arise, whereby a shipment of sheep may suffer injury from vicious dogs or wild animals when unloaded for

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feed, water, and rest? We think not. We are of the opinion that if the pens provided by the carrier are properly equipped, so that the sheep may be properly fed, watered, and rested, he has discharged his full duty, unless it is made to appear that the surrounding conditions were such that the carrier should have anticipated that the sheep would probably be molested, and thus not afforded proper rest. If such is not the law, then the carrier is made an absolute insurer of the safety of the sheep while unloaded for food, rest, and water, regardless of the fact that by the exercise of reasonable^e diligence he did not know, and could not have discovered, the threatened danger to which the sheep may be exposed. In our judgment, such is not the meaning or purpose of the statute. It will be seen that the statute in terms excuses the carrier for things which are accidental or unavoidable, and which could not be anticipated or avoided by the "exercise of due diligence and foresight." Of course, if such an excuse is good as against the duty to provide means and facilities to feed and water, it likewise must be good as against the duty to provide means for rest.

[2] We are of the opinion, therefore, that, in order to hold a carrier liable for some cause which does not arise out of some defect which inheres in the pens themselves, such as being infected with disease, or of insufficient strength to hold the stock, or when rest is impossible because of some improper conditions of the pens, the shipper must show that the carrier, by the exercise of "due diligence and foresight," could have avoided the injury to the stock. The shipper must show that the carrier was guilty of negligence which was the cause of the injury. Had it been shown in this case that vicious dogs or wild animals, whose natural propensities were such as to injure sheep, were prevalent at Reno, and that respondent knew or ought to have known that such was the case, or if it had been shown that occurrences of a like character had taken place within a reasonable time prior to the time in question, then the jury might probably have inferred negligence on the part of respondent in not providing pens which would protect the sheep from interference. Such seems, also, to have been the theory of counsel for appellant when they prepared the complaint, as in it they based their right to recover upon the fact that respondent was guilty of negligence. It was only when they came to try the case that they insisted that the duty of the respondent was an absolute one, enforceable under all conditions. We cannot agree with counsel's theory, as contended for at the trial and in this court, for the reasons we have stated.

In view of the conclusions reached, the other errors assigned are immaterial, and hence require no discussion. Nor is it necessary to consider what effect, if any, the provisions of the

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contract which we have quoted from would have as between the parties. Since we have reached the conclusion that respondent is not liable under the statute, even though the sheep were in its charge, it is wholly immaterial at this time to determine whether the shipper and carrier may by contract shift the burden imposed by the statute from the latter to the former.

From what has been said, it follows that the judgment should be, and it accordingly is, affirmed, with costs to respondent.

McCARTY, J., concurs. STRAUP, J., concurs in the result.

HULL v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 17, 1911.)

[96 N. E. Rep. 58.]

Carriers—Carriage of Passengers—Obligations.*—One who has been accepted as a passenger is lawfully on the train, and the carrier must provide reasonable facilities for his transportation in safety, and protect him from violence and annoyance from employees, fellow passengers, or strangers.

Carriers—Carriage of Passengers—Regulations—Validity.†—Under St. 1906, c. 463, pt. 2, § 181, a carrier may in the performance of its duties to its passengers establish and enforce reasonable regulations for its protection in the management of its business, and the exclusion of dogs from its passenger coaches and carrying them for hire in its baggage cars is not unreasonable.

Carriers—Ejection of Passengers—Justification.‡—The refusal of a passenger to remove his dog in his possession in the passenger

*For the authorities in this series on the duty of a carrier to protect its passengers from violence, see first foot-note of *Alabama City, etc., Co. v. Sampley* (Ala.), 38 R. R. R. 528, 61 Am. & Eng. R. Cas., N. S., 528; first foot-note of *Penny v. Atlantic C. L. R. Co.* (N. Car.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 535.

For the authorities in this series on the subject of the duty to protect passengers against their fellow passengers, see first foot-note of *Jansen v. Minneapolis, etc., Ry. Co.* (Minn.), 39 R. R. R. 111, 62 Am. & Eng. R. Cas., N. S., 111; first foot-note of *Glennen v. Boston, etc., Ry. Co.* (Mass.), 39 R. R. R. 455, 62 Am. & Eng. R. Cas., N. S., 455; *Penny v. Atlantic C. L. R. Co.* (N. Car.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 535.

†For the authorities in this series on the validity of a carrier of passenger's rules and regulations, see foot-note of *Martin v. Rhode Island Co.* (R. I.), 39 R. R. R. 415, 62 Am. & Eng. R. Cas., N. S., 415; first foot-note of *Kyle v. Chicago, etc., Ry. Co.* (C. C. A.), 39 R. R. R. 149, 62 Am. & Eng. R. Cas., N. S., 149; *Kirk v. Seattle Elec. Co.* (Wash.), 37 R. R. R. 493, 60 Am. & Eng. R. Cas., N. S., 493.

‡For the authorities in this series on the enforcement of a carrier of passenger's rules and regulations, see *Kirk v. Seattle Elec. Co.* (Wash.), 37 R. R. R. 493, 60 Am. & Eng. R. Cas., N. S., 493 (right

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coach to the baggage car pursuant to the request of the conductor notifying him of the rule of the carrier excluding dogs from passenger coaches and carrying them in the baggage cars warrants his ejection at the next station by use of reasonable force on his refusal to alight.

False Imprisonment—Passenger “Refusing to Pay Fare.”—A passenger who refuses to obey a rule of the carrier excluding dogs from passenger coaches while carrying them for hire in baggage cars does not evade the payment of fare within Rev. Laws, c. 108, § 18, empowering railroad police officers to arrest a passenger refusing to pay fare, and the arrest of the passenger for evading fare is illegal.

Carriers—False Imprisonment—Actions by Passengers—Justification.—Where, in an action by a passenger for assault and battery and false imprisonment, the answer was the general denial, the defense that the acts complained of were justified under Rev. Laws, c. 108, § 18, authorizing the arrest of passengers refusing to pay fare, was not available.

Carriers—False Imprisonment—Carriage of Passengers—Liability for Acts of Employees.§—A carrier is answerable for the conduct of its brakeman and station agent who assisted the conductor in wrongfully ejecting a passenger, and restraining him of his liberty.

to refuse passenger a transfer for violating rule forbidding riding on front platform of street car); *St. Louis, etc., R. Co. v. Johnson* (Okl.), 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165 (right to eject for violation of rules); *Burge v. Georgia, etc., Co.* (Ga.), 33 R. R. R. 223, 56 Am. & Eng. R. Cas., N. S., 223 (right to eject one making no other tender of fare than an amount in excess of that the conductor is required to change by a rule of the carrier); *Louisville & N. R. Co. v. Berry* (Fla.), 33 R. R. R. 227, 56 Am. & Eng. R. Cas., N. S., 227 (liability of carrier on account of unreasonable manner of enforcing reasonable rule); *Knoxville Traction Co. v. Wilkerson* (Tenn.), 22 R. R. R. 763, 45 Am. & Eng. R. Cas., N. S., 763 (right to eject to enforce rule limiting amount conductor is required to change, where passenger had no knowledge of existence of rule); *Norton v. Consolidated Ry. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437 (reasonableness of rule requiring expulsion of passenger who refuses to pay fare or produce proper transfer ticket); *Birmingham Ry., etc., Co. v. Stallings* (Ala.), 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319 (where passenger goes from one street car of a train to another, he may be ejected for refusing to again pay fare, though he was ignorant of the rule requiring such payment); *Birmingham Ry., etc., Co. v. McDonough* (Ala.), 26 R. R. R. 618, 49 Am. & Eng. R. Cas., N. S., 618 (liability of carrier for enforcement of rule with undue severity); *Ammons v. Southern Ry. Co.* (N. Car.), 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340 (enforcement of rule requiring purchase of ticket before entering car); *Decker v. Atchison, etc., R. Co.* (Okl.), 2 Am. & Eng. R. Cas., N. S., 118 (right to eject for entering train before the time prescribed by rule); *Nelson v. Salt Lake R. T. Co.* (Utah), 2 Am. & Eng. R. Cas., N. S., 156 (right to eject for smoking contrary to rule); *Church v. Chicago, etc., R. Co.* (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 1 (ejection for failure to change cars as required by rule).

§For the authorities in this series on the liability of railroads

Hull v. Boston & M. R. R

Exceptions from Superior Court, Worcester County; John A. Aiken, Judge.

Action by Roscoe H. Hull against the Boston & Maine Railroad. There was a verdict for \$30 damages, and he brings exceptions. Sustained.

This was an action of tort for assault and battery and false imprisonment of plaintiff by defendant acting through its officers and agents ejecting plaintiff from a train and restraining him of his liberty.

The plaintiff's evidence tended to show that upon the morning of the 29th day of May, A. D. 1909, accompanied by his wife and sister, he became a passenger upon one of the defendant's trains which left Worcester at 8:10 a. m. to travel to Charleston, N. H., to which point they had valid tickets which they presented to the conductor who punched them through to Winchendon, Mass.; that the plaintiff, who was sitting in the seat with his wife, had with him a small dog weighing 13½ pounds, which he carried in his lap; that the dog was the property of the plaintiff's wife, but this fact was not communicated to conductor Smith; that, when the conductor took the tickets, he told the plaintiff that he would have to take the dog into the baggage car because it was the rule of the railroad; that the plaintiff declined, telling the conductor that he would keep the dog in his lap so that it would not touch any of the defendant's property.

The evidence of all the witnesses was that the conductor showed his badge to the plaintiff and notified him that he was under arrest before removing him from the train, and there was no evidence that any new or different arrest was made after they had taken the plaintiff out of the car or that the defendant itself or any one at the direction or request of the defendant ever prosecuted the plaintiff in any court for anything connected with the occurrences herein involved, or that the defendant or any one at its request or instigation ever made any complaint against the plaintiff in any court or ever secured any warrant for his arrest, or that the officers and servants of the defendant characterized what they did as anything other than an arrest until agent Chase had brought the plaintiff to the square and attempted to deliver him to the chief of police whose evidence was that agent Chase requested him to arrest the plaintiff.

for assaults on their passengers by their employees, see first foot-note of *Houston, etc., R. Co. v. Bush* (Tex.), 39 R. R. R. 428, 62 Am. & Eng. R. Cas., N. S., 428; *Jackson v. Old Colony St. Ry. Co.* (Mass.), 38 R. R. R. 581, 61 Am. & Eng. R. Cas., N. S., 581; last foot-note of *McDade v. Norfolk, etc., Ry. Co.* (W. Va.), 37 R. R. R. 554, 60 Am. & Eng. R. Cas., N. S., 554; foot-note of *Whitlock v. Northern Pac. Ry. Co.* (Wash.), 37 R. R. R. 125, 60 Am. & Eng. R. Cas., N. S., 125.

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Jos. P. Carney and Herbt. W. Blake, for plaintiff.*Chas. M. Thayer and Alex. H. Bullock*, for defendant.

BRALEY, J. [1] The plaintiff having been accepted as a passenger was lawfully in the car, and the defendant had undertaken to provide reasonable facilities for his transportation in safety and to protect him from violence, annoyance and discomfort whether arising from disorderly conduct of fellow passengers, or the wrongful interference of its employees, or the intrusion of strangers whose presence by the exercise of due care could have been anticipated and prevented. *Jackson v. Old Colony St. Ry.*, 206 Mass. 477, 485, 486, 92 N. E. 725, 30 L. R. A. (N. S.) 1046; *Exton v. Central R. R.*, 62 N. J. Law, 7, 42 Atl. 486, 56 L. R. A. 508; *Id.*, 63 N. J. Law, 356, 46 Atl. 1099, 56 L. R. A. 508; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049. [2] In the performance of this duty the railroad had the right to establish and enforce reasonable regulations for its own protection in the management of its business. *St.* 1906, c. 463, pt. 2, § 181; *Commonwealth v. Powers*, 7 Metc. 596, 41 Am. Dec. 465; *O'Neill v. Lynn & Boston R. R.*, 155 Mass. 371, 29 N. E. 630; *Cutts v. Boston Elev. Ry.*, 202 Mass. 450, 455, 89 N. E. 21. It is common knowledge that for various reasons, which may be either fanciful or well founded, the presence of dogs even when accompanied by their owners or custodians often causes passengers serious discomfort and annoyance, or apprehension of bodily danger; and the exclusion of dogs from its passenger coaches while permitting them to be carried for hire in the baggage cars is not an unreasonable exercise of this authority. *Commonwealth v. Powers*, 7 Metc. 596, 601, 41 Am. Dec. 465; *Honeyman v. Oregon & Calif. R. R.*, 13 Or. 352, 10 Pac. 628, 57 Am. Rep. 20; *Gregory v. Chicago & Northwestern Ry.*, 100 Iowa, 345, 69 N. W. 532. [3] The plaintiff having been informed of the regulation was bound by it, and when requested by the conductor to remove the dog in his possession and control to the baggage car and to make the necessary payment, his refusal would have warranted his expulsion by the use of sufficient but not excessive force if, when the train stopped at the next station, he had refused to depart. *Commonwealth v. Jones*, 174 Mass. 401, 54 N. E. 869; *Johnson v. Concord R. R.*, 46 N. H. 213, 88 Am. Dec. 199; *Whitesell v. Crane*, 8 Watts & S. (Pa.) 369; *Trotlinger v. East Tennessee, Virginia & Georgia R. R.*, 11 Lea (Tenn.) 533; *Jackson v. Old Colony St. Ry.*, 206 Mass. 477, 92 N. E. 725, 30 L. R. A. (N. S.) 1046. [4] But upon the uncontradicted evidence the conductor, who also was a railroad police officer, after a somewhat prolonged colloquy with the plaintiff, instead of taking proper measures to enforce the regulation exhibited his badge of office and informed him that he

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was placed under arrest "for evading fare." By the common law this restraint was illegal; and under R. L. c. 108, § 18, authority to arrest without a warrant is conferred only where the passenger refuses to pay his fare or is noisy or disorderly. The plaintiff, however, in refusing to obey the regulation was not guilty of an evasion of his fare, and throughout the controversy he was not charged with unseemly behavior. [5] The defendant's answer moreover was a general denial under which this defense was not open. *Jackson v. Old Colony St. Ry.*, 206 Mass. 477, 484, 92 N. E. 725, 30 L. R. A. (N. S.) 1046. No justification having been shown for the duress and indignity to which he was subjected not only while on the train but at the station, or for the force used upon his person in removing him from the car and until he was released from custody, the defendant is responsible in damages, whether the conductor acted as its servant or as a special police officer. [6] It also is answerable for the conduct of its brakesman and station agent who rendered assistance and participated in the assault and false imprisonment. *Brock v. Stimson*, 108 Mass. 520, 521, 11 Am. Rep. 390; *Jackson v. Old Colony St. Ry.*, 206 Mass. 477, 92 N. E. 725, 30 L. R. A. (N. S.) 1046; *Horgan v. Boston Elevated Ry.*, 208 Mass. 287, 94 N. E. 386; R. L. c. 108, § 20. It is therefore clear that the plaintiff's second request that the defendant had shown no justification for the assault, was in accordance with the evidence; and the instructions to which he excepted that the defendant would be liable only for the use of excessive force in the plaintiff's ejection and for the wrongful restraint of his liberty after he reached the station platform were insufficient.

Exceptions sustained.

CHICAGO & A. R. CO. v. PEORIA & P. U. RY. CO.

(Supreme Court of Illinois, April 19, 1911. Rehearing Denied June 7, 1911.)

[95 N. E. Rep. 137.]

Carriers—Contracts—Construction—Liability. — Where a terminal railway company owning transfer facilities for the transfer of cars of railway companies entering the city contracted with one of such companies whereby it could use, for an annual rent and payment for the maintenance of the tracks, all terminal facilities, and whereby it obligated itself to deliver to the terminal company all freight cars for transfer, and whereby the terminal company agreed to transfer cars, such company was a lessee of the terminal company with the right to use the terminal facilities subject to a similar right by the terminal company and other railway companies, and cars transferred by the terminal company as ordered by such lessee remained under the exclusive possession of such lessee and the terminal company was not liable for any loss of goods while such cars were on its terminal facilities.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Peoria County; L. D. Puterbaugh, Judge.

Action by the Chicago & Alton Railroad Company against the Peoria & Pekin Union Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff and granting a certificate of importance, defendant appeals. Reversed and remanded.

Stevens, Miller & Elliott, for appellant.

Page, Wead, Hunter & Scully, for appellee.

DUNN, J. The Appellate Court for the Second District affirmed a judgment of the circuit court of Peoria county in favor of the appellee against the appellant, and granted a certificate of importance and appeal to this court.

Appellee's claim was for reimbursement of the amount paid by it to several claimants for the loss of goods from freight cars transferred by the appellant. The appellant is a railroad corporation owning and operating a railroad from Peoria to Pekin. It owns extensive terminal facilities in Peoria, consisting of main tracks, side tracks, switches, turn-outs, connecting tracks, roundhouses, freight houses, passenger depots, and storage and unloading tracks, together with cars and locomotives necessary in carrying on its business. It does an extensive business in transferring for other railroad companies whose railroads enter the city of Peoria, loaded and empty freight cars between the

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terminal points of such railroads in the city and between such terminal points and the points of destination of such cars on the tracks of appellant in the city. The appellee is a railroad corporation running its trains into the city of Peoria, but not owning or operating any terminal facilities there. By virtue of a contract with the appellant, it is entitled to the use of all the terminal facilities of the appellant in Peoria, and is obliged to deliver all its freight cars coming into or going out of or through Peoria to the appellant to be transferred, and the appellant is bound to transfer all loaded or empty cars between all freighthouses, warehouses, and the various other points of delivery on its tracks and the tracks and warehouses of other railroads with any of which any of the appellant's tracks shall be connected and the tracks and divisions of appellee's railroad. The appellee was granted the right to use the tracks and terminal facilities, but not exclusively, the appellant reserving the right to make or renew similar contracts with other railroad companies and to use such tracks and terminal facilities for the operation of its own trains. The appellee agreed to pay as rental for the said tracks and terminal facilities \$22,500 per annum; to pay its just proportion, according to a rule established by the contract, of the maintenance, renewal, and repair of certain of the tracks and premises; to pay such reasonable sum for each of its passenger, mail, and baggage cars entering or leaving the appellant's union passenger depot at Peoria as should be fixed by the appellant, being a uniform rate for each car to be charged all companies running their passenger trains to and from the said depot without discrimination; to pay all such reasonable charges as should be made by the appellant for the transfer services to and from connecting railroads, being a uniform rate for each car, previously fixed by the appellant, to be charged to all companies for such service, without discrimination; and to pay all such reasonable charges as should be made by the appellant for handling and switching its loaded and empty cars to and from freighthouses, warehouses, packinghouses, stockyards, grain elevators, distilleries, mills, and other industries at the cities of Pekin and Peoria, being a uniform rate for each car, which should have been previously fixed by the appellant, to be charged to all companies for such services, without discrimination. The contract provided for the full and equal use and enjoyment, without discrimination, by the appellee, and by all other companies having the right to such use and enjoyment, of all the said tracks, switches, depots, freighthouses, and other property, of the service of handling, switching, and transferring cars, of equal facilities and accommodations for their business, and of equal care and attention to it on the part of the appellant, and that the general management, control, and supervision of

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all the property, and of the use, location, improvement, and repair of it, should be in the full and sole control of the appellant. The written contract is long, but it is believed that what has been set out discloses sufficient of its terms for the proper disposition of the case. It was under this contract that the goods, the loss of which constitutes the appellee's claims, first came to the possession of the appellant. The goods were shipped over different railroads from different places, at different times, to different consignees, and were all brought by the appellee in its trains to Peoria to the yards of the appellant. The appellee in each instance directed the appellant to transfer the car to the appellant's Water street track, to be unloaded by the consignee. The cars were transferred by the appellant and left on the track where the appellee directed them to be placed. Before they were unloaded, the cars were broken into and a part of the goods were stolen.

The chief controversy is as to the existence of a duty on the part of the appellant to exercise care to prevent the loss of the contents of the cars after they had been placed upon the track where directed by the appellee. The parties agree that in transferring the cars the appellant acted as a common carrier. Their disagreement is as to when the appellant's service ended. The appellant claims that it had performed its whole duty when it set the cars for unloading as directed by the appellee, and that its liability for the cars or their contents then ceased. The appellee insists that after the cars were placed for unloading the appellant was still bound to exercise care to prevent the loss of them, and that its liability was that of a warehouseman. On the trial propositions of law were submitted by either side as to the appellant's duty and liability. Those stating the appellee's view were held by the court and those stating the appellant's view were refused.

By the cases of *Peoria & Pekin Union Railway Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348, and *East St. Louis Connecting Railway Co. v. Wabash, St. Louis & Pacific Railway Co.*, 123 Ill. 594, 15 N. E. 45, it is determined that appellant was not liable as a common carrier after placing the cars. The trial court and the Appellate Court, however, held it liable as a warehouseman or bailee for hire, and in so doing fell into error. In the contract between the parties the appellee is referred to as a lessee. In fact, it is a lessee. It has a right to the possession and use of the tracks and property mentioned in the contract as complete, though not so extensive, as that of the appellant, who owns them. The right is not exclusive, but is shared with the appellant and the other railroad companies to whom similar leases have been made. Whenever any part of the appellant's track is occupied by the appellee's cars, placed there, under the contract, for

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delivery to the consignee, the occupancy is the appellee's occupancy. It is for the time being exclusive, and as rightful and complete as if the appellee were the sole owner of the track. Whenever the appellee orders a car placed on one of the appellant's tracks which the appellee has the right to use, and the car is accordingly so placed, the appellee's possession and control of the car are as complete and its rights and obligations in respect thereto are the same as if the car stood upon any part of the appellee's own track, except that the appellee cannot use its own motive power to change the location of the car but must call upon the appellant for that purpose. In switching and transferring cars in accordance with the appellee's directions, whether from the appellee's terminal at Peoria to the track of appellant convenient for delivery to the consignee, or from one of the tracks or divisions of the appellee's railroad to another of such tracks or divisions, or to another railroad, or from one of the appellant's tracks to another, the appellant's duty and liability are the same. In all this switching service, of whatever character, it acts merely as the agent of the appellee to shift the latter's cars from one track which the appellee has a right to use to another track which it has a right to use, for the purpose of enabling the appellee conveniently to complete its contract of carriage and make delivery to the consignee. There is nothing to indicate that the appellant, when switching cars, knows anything about the car or its contents or consignee, or has any right to demand any such information. So far as appears, it merely receives notice to move a certain car from one track to another, and has nothing to do with or knowledge of the consignee, the unloading, the delivery or the notice to the consignee. It has no further duty to perform in connection with that car until again requested to move it.

The contract of the appellant with the appellee was not to deliver to the consignee. That was the duty of the appellee. Since it had no facilities for delivering freight at its own terminal it obtained from the appellant a lease of other premises for that purpose, and since it could reach such premises only over the appellant's track, it employed the appellant to switch its cars to such premises. These premises, in the present case, were the appellant's Water street track, which was leased to the appellee in common with others, the lessor also reserving a certain use to itself. The service performed by the appellant was the hauling of cars from one of defendant's tracks to another, and, when that service was performed, the appellant's liability ended. When the cars were placed on the Water street track, they were no longer in the possession of the appellant, but were in the appellee, and the duty of delivery to the consignee, and the care of the car and

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its contents until such delivery, rested not upon the appellant but upon the appellee.

The judgment of the Appellate Court and circuit court will be reversed, and the cause will be remanded to the circuit court.

Reversed and remanded.

CARTER, J., dissenting.

PARIS & G. N. R. Co. v. ROBINSON et al.

(Supreme Court of Texas, Nov. 15, 1911.)

[140 S. W. Rep. 434.]

Carriers—Passengers—Injuries—Instructions—Contributory Negligence—"Intoxicated"—"Drunk."*—To prevent the intoxication of a passenger resulting in injuries from being contributory negligence barring recovery, the intoxication must have rendered the passenger mentally or physically incapable of protecting himself from danger or of appreciating his danger, which condition must be known to the carrier's agent whose negligence is alleged to have caused the injury; so that, in an action for decedent's death by falling from the platform where he went when intoxicated, alleged to have been caused by the railroad company's negligence in permitting him to go onto the platform in such condition, it was error to instruct that the jury should find for plaintiff if decedent was "drunk," and defendant's servants, knowing his condition, knowingly suffered him to go out upon the platform while the train was running at such a speed as to make it dangerous for him, being "drunk," to stand on the platform, the word "drunk" being synonymous with "intoxicated," and indicating varying degrees of intoxication (quoting 3 Words & Phrases, p. 2208).

Carriers — Passengers—Injuries—Sufficiency of Evidence.—Evidence in an action for a railroad passenger's death by falling off the platform held to show that decedent was not so intoxicated that he could not take care of himself or realize the danger of his position

*For the authorities in this series on the subject of intoxication as contributory negligence, see second foot-note of Hughes v. Chicago, etc., Ry. Co. (Iowa), 39 R. R. R. 759, 62 Am. & Eng. R. Cas., N. S., 759.

For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers or prospective passengers in a state of intoxication, see first foot-note of Hughes v. Chicago, etc., Ry. Co. (Iowa), 39 R. R. R. 759, 62 Am. & Eng. R. Cas., N. S., 759; Chesapeake, etc., Ry. Co. v. Selsor (Ky.), 39 R. R. R. 739, 62 Am. & Eng. R. Cas., N. S., 739; last foot-note of Louisville, etc., Ry. Co. v. Gregory (Ky.), 39 R. R. R. 382, 62 Am. & Eng. R. Cas., N. S., 382.

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on the steps, and that his falling from the steps was due to his own negligence in failing to see a switch target which struck him.

Carriers—Passengers—Injuries—Negligence.—If the train employees did not know that a passenger was so intoxicated as to be unable to care for himself, or realize the danger in going upon the platform steps, they could assume that he knew of the danger of such position, and would use reasonable care under the circumstances to protect himself from injury.

Appeal and Error—Disposition—Rendition.—The Supreme Court will not render judgment for insufficiency of the evidence if it is probable that the case has not been fully developed at trial.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Anna Robinson and others against the Paris & Great Northern Railroad Company. Judgment for plaintiffs in the Court of Civil Appeals (127 S. W. 294), and defendant brings error. Reversed and remanded.

See, also, 53 Tex. Civ. App. 12, 114 S. W. 658.

Andrews, Ball & Streetman, Wright & Patrick, and W. F. Evans, for plaintiff in error.

Allen & Dohoney and B. B. Sturgeon, for defendants in error.

DIBRELL, J. This is an action by Mrs. Anna Robinson, in her own right and as next friend of her minor children, Winnie and William Robinson, to recover damages in the sum of \$25,000 against the Paris & Great Northern Railroad Company in the district court of Lamar county for the alleged negligent killing of W. I. Robinson on November 2, 1905, the husband and father of plaintiffs, respectively.

As grounds of negligence on the part of the defendant, the plaintiffs alleged that the said W. I. Robinson on November 2, 1905, in Paris, Tex., "got aboard one of defendant's cars as a passenger to go to Hugo, then Indian Territory, now the state of Oklahoma," and that, when he boarded said train, he was in such a state of intoxication as to be incapable of protecting himself against dangers ordinarily incident to railroad travel, and that Robinson's condition was known to the employees of defendant; that, while defendant's train was running at a high rate of speed, the said Robinson in his intoxicated condition was permitted to go out onto the platform of the defendant's car and take a position on the platform and steps, and, while thus riding, the said Robinson was thrown or fell from said moving train, and was killed. It was also alleged that defendant's servants knew that Robinson was in said dangerous position, and that he was too drunk to realize his peril or to protect himself from the danger incident to his said position, and that defendant's servants, knowing the danger the said Robinson was in, did nothing to warn

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him of his danger, or to protect him from injury. It was also alleged as a ground of negligence that defendant's cars were not provided with guard rails, gates, or other protection to prevent passengers from falling from the platform.

The defendant answered by general demurrer, general denial, and specially pleaded that on the day alleged in plaintiffs' petition the said W. I. Robinson purchased a ticket at Paris, Tex., to Hugo, I. T., and boarded defendant's car in company with a friend, and that a comfortable seat was furnished him in defendant's car where he was perfectly safe; that the conductor on defendant's train took up the ticket of said Robinson, and that, while it was noticeable that he was or had been drinking intoxicants, yet he was perfectly rational and fully able to take care of himself, and was on a seat with a friend who had been with him in Paris and in whose care he seemed to be; that, while defendant's servants were in the discharge of their several duties in taking up tickets and looking after various things required of them in managing and running said train, the said Robinson, without the knowledge or consent of defendant's servants in charge of said train, "left his seat within the car, and passed out of said car, and went upon the platform of same, and took a position on the steps of the car with his hands holding to the handhold, and his body inclined from the car; that all during this time the car and train to which it was attached was in motion; that about the time the train reached Lenoir, a small flag station of the defendant's, the said W. I. Robinson either jumped or fell from said steps, and in the fall struck on a switch target near the track nearly severing his head from his body, and instantly killing himself." It was also specially pleaded that the seat furnished the said Robinson, and which he was occupying, was a safe one, and, if he had remained therein, the injury would not have occurred; that neither the platform nor the steps of the car are for the accommodation of passengers save as a mode of ingress and egress to and from the car; that they are places of obvious danger, and that it is contrary to the rules of the defendant for passengers to ride on either, which was well known to said W. I. Robinson, or by the exercise of ordinary care could have been known to him; that such notice was posted in the car in large letters in a conspicuous place that passengers were not permitted to ride on the platform.

The case was tried by a jury and a verdict rendered for plaintiffs for \$7,000, which was duly apportioned between them. The case, having been appealed to the Court of Civil Appeals, Sixth District, by which court the judgment of the lower court was affirmed, is before this court upon writ of error.

There are a number of questions raised by the defendant in its brief, but, in view of the disposition this court has thought proper to make of the case, it will not be necessary to discuss all

of such questions, as it seems no useful purpose could thereby be subserved. The main questions upon which we have determined to dispose of the case relate to the court's charge and the sufficiency of the evidence.

[1] The trial court submitted the case to the jury upon the theory that if they found from the evidence that the deceased being a passenger on defendant's train was "drunk," and that defendant's servants, knowing his condition, knowingly suffered him to go out upon the platform of its car while the train was running at such speed as would make it dangerous for him, being "drunk," to stand on the platform or on the steps of the car, and that he fell or was thrown from the platform or steps, they would find for the plaintiffs. This charge was given without allegation or proof of any other specific act of negligence on the part of defendant than permitting deceased to occupy the obviously dangerous position he had voluntarily assumed, and in consequence of which he fell from the train and was killed. To have thus instructed the jury was in our opinion error.

No qualification of the term "drunk" was given the jury by which the rule fixing the liability of carriers for a lack of exercising its guardianship over drunken passengers is limited to those who have been accepted as passengers in a state of drunkenness or intoxication to such an extent as they are not capable of taking care of themselves, or who are incapable of appreciating the danger liable to follow their acts.

The term "drunk" is synonymous with the word "intoxicated," and is of varying degrees. This was recognized by the learned Chief Justice of the Court of Civil Appeals when this case was first before that court (*Paris & G. N. Ry. Co. v. Robinson*, 53 Tex. Civ. App. 12, 18, 114 S. W. 661), in the following language: "Intoxication is of varying degrees. A person so under the influence of liquor as not to be entirely himself is intoxicated, yet he may not betray it by either movement or word, and his condition may not be discernible by his intimate friends. It would hardly be contended that as to such person the carrier must resort to other than the ordinary means for his safety. Again, a person may be 'staggering drunk,' and yet be capable of transacting with intelligence important business, and with great foresight providing under circumstances for his own safety and comfort." That the term "drunk" is not a well-defined term either in law or in the common acceptance of the meaning of the word is found in the fact that all the standard dictionaries make its meaning synonymous with the word "intoxicated." The fact that the term "drunk" or "intoxicated" is a term of varying degrees is recognized in that standard authority, *Words & Phrases* (vol. 3, p. 2208), as follows: "There are degrees of intoxication or drunkenness. A man is said to be 'dead drunk' when he is perfectly unconscious—powerless. He is said to

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be 'stupidly drunk' when a kind of stupor comes over him. He is said to be 'staggering drunk' when he staggers in walking. He is said to be 'foolishly drunk' when he acts the fool. All these are cases of drunkenness, of different degrees of drunkenness. So it is a very common thing to say a man is 'badly intoxicated,' and again that he is 'slightly intoxicated.' There are degrees of drunkenness, and therefore many persons may say that a man was not intoxicated because he could walk straight; he could get in and out of a wagon. Whenever a man is under the influence of liquor so as not to be entirely himself, he is intoxicated, although he can walk straight. Although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be himself, so as to be excited, and not to possess that clearness of intellect and control of himself that he otherwise would have, he is intoxicated."

In the latest Webster's International Dictionary the term "drunk" is thus defined: "Intoxicated with or as with strong drink, under the influence of an intoxicant, especially an alcoholic liquor, so that the use of the faculty is materially impaired." In Bouvier's Law Dictionary, Rawle's Revision, the term is defined as "the condition of a man whose mind is affected by the immediate use of intoxicating drinks"; and the same author proceeds in his discussion of the meaning of the term "drunk" or "drunkenness" to say: "This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and insensibility. In the popular phrase the term 'drunkenness' is applied only to those degrees of it in which the mind is manifestly disturbed in its operation. In the earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude, and vigor."

It seems clear that the term "drunk" as ordinarily understood is a term susceptible of varying degrees, and the charge of the court authorized the jury to find for the plaintiff if they believed from the evidence that W. I. Robinson was drunk, and met his death under the other circumstances heretofore mentioned as composing the substance of the court's charge. An approval of this charge would be an approval of the doctrine in this state that the carrier is required to exercise greater care, caution, and protection for passengers who are voluntarily drunk or intoxicated than for those passengers who are sober and orderly, and that without consideration as to the degree of intoxication, whether it has reached the stage of hilarity, the height of generating the dare-devil spirit, or producing incapacity of self-care, or insensibility of those acts that menace limb and life. To such a rule this court cannot subscribe. No

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precedent that we have been able to find in this state recognizes the rule as laid down by the charge of the learned trial judge otherwise so admirably drawn, and we are not able to appreciate the soundness of the wisdom or policy that would be exercised by so extending the rule as we understand it to now be in this state. We think the rule in this state is, with reference to the duty of the carrier of intoxicated persons accepted for transportation, and where such persons are injured or killed, that, in order to deny the effect of the plea of contributory negligence, it should be required of the person seeking such recovery to show that the intoxicated person so injured or killed was so intoxicated as to be mentally or physically incapable of protecting himself from danger, or of appreciating the danger to himself as a consequence of his acts, and that this condition was known to the agent and servant of the carrier through whose negligence the injury or death is alleged to have resulted.

We approve the rule on this subject as stated by Hutchinson on Carriers (3d Ed.) § 1230, as follows: "The mere fact that the passenger is intoxicated will not, as we have seen, justify the carrier in excluding him from his conveyance, so long as he conducts himself in a quiet and peaceable manner. Nor will intoxication excuse a carrier from liability for injury to the passenger by negligence, or justify the exposure of the passenger to danger. Intoxication does not per se constitute contributory negligence, but is a matter to be taken into consideration as bearing on the question whether the passenger has, by his own conduct, brought the injury upon himself. The law exacts from one who is voluntarily intoxicated the same degree of care and caution in avoiding an exposure of his person to danger as it exacts from a sober person of ordinary prudence under like circumstances. If intoxication renders the passenger indifferent or thoughtless, and, in consequence, he fails to exercise ordinary care to protect himself from danger, and is injured, it will be no excuse to him that his failure to do so was superinduced by a state of intoxication. * * * So, where the authorized agents of a carrier accept an unattended person as a passenger with knowledge that he is so intoxicated as to be mentally and physically incapable of protecting himself from danger, the question of contributory negligence cannot arise." In the case of *H. & T. C. Ry. Co. v. Bryant*, 31 Tex. Civ. App. 483, 72 S. W. 888, Judge Fly held that although "Will Bryant" (for whose death damages were being sought) "may have acted with reasonable prudence in taking his position upon the platform of the car, still if, after assuming that position, his intoxication caused him to fall from the platform, such drunkenness would be proximate cause of his death, and his wife and parents could not recover damages." In the case of *Ebert v. G., C.*

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& S. F. Ry. Co. (Civ. App.) 49 S. W. 1105, the plaintiff sued the railroad company for damages. The facts in that case show that Ebert was a boy 15 year old, and that he stepped out on the platform of the car while the train was going at a high rate of speed, and was riding on the platform in the presence of the train porter, and falling from the train while riding in this position was injured. Upon the principle that the danger of the position assumed by the plaintiff in that case was as apparent to the plaintiff as it was to the defendant's servants, and that plaintiff and the porter "being equally cognizant of the danger, no duty devolved on the porter to warn him." The plaintiff in the case above cited was denied the right of recovery; the decision having been rendered by Mr. Chief Justice James of the Fourth Court of Civil Appeals upon the theory of contributory negligence. The same principle laid down in the foregoing case is that laid down in the text-books. Wharton on Negligence, § 208, states it in this language: "A drunkard may be guilty of contributory negligence by getting drunk before putting himself in a position of danger in which he receives injuries from which had he been sober he would have escaped." Patterson Railway Accident Law, § 76, thus states the principle: "The fact that the person injured is intoxicated at the time of the injury will not relieve him from the legal consequences of his contributory negligence." 1 Thompson on Negligence, § 340, states the same principle in the following language: "Voluntary intoxication cannot be pleaded to avert the consequences of one's own negligence."

It is insisted, and we are referred to a number of authorities in support of the proposition, that the rule in this state with reference to the liability of carrier for injuries occurring to its passengers who are intoxicated is that the carrier "would only be liable for wanton or willful neglect on the part of its employees towards the deceased of the duty of caring for his safety if he was intoxicated, even to the extent of insensibility." This rule seems to have been announced in the case of Railway Co. v. Evans, 71 Tex. 367, 9 S. W. 325, 1 L. R. A. 476, but it will be observed that the doctrine there stated was applicable to the peculiar facts of that case, in which the deceased was wrongfully on a freight train, and not a passenger of the railway company. So that in none of the Texas authorities has the rule been approved that the extent of the care of the carrier towards passengers who are intoxicated to the extent of being incapable of taking care of themselves, or incapable of realizing the danger of their acts, is limited to wanton or willful neglect. In all of those cases with which we are familiar where that rule seems to apply are those cases in which the intoxicated person was either a trespasser or a licensee only. This is true of the cases of Railway Co. v. Evans, 71 Tex. 367, 9 S. W.

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325, 1 L. R. A. 476; H. & T. C. Ry. Co. *v.* Smith, 52 Tex. 185; H. & T. C. Ry. Co. *v.* Sympkins, 54 Tex. 623, 38 Am. Rep. 632; H. & T. C. Ry. Co. *v.* Waller, 56 Tex. 331.

While we approve the rule of "wanton or willful neglect" toward those who are injured by the carrier while drunk, even to the extent of insensibility, we think it should be confined to those in that condition who are either trespassers or mere licensees, and not to those who are passengers. With regard to passengers, a different rule must apply as it has been heretofore stated. Such is dictated by considerations of humanity. The weakness of human nature that permits the appetite for intoxicants to be excessively indulged by men is as much a natural deformity as the man born with weak mentality, or defective sight or hearing, and whenever such person becomes intoxicated to the extent that he is incapacitated mentally and physically to care for himself, or rendered incapable of understanding or appreciating the danger incurred or produced by his acts, it devolves upon the servants of the carrier when the condition of such person is known to them to use the same care and precaution for his protection as is required of them in cases where the passenger has defective sight or hearing, or is so mentally weak as to be unable to care for himself, or to understand the natural consequences of his acts.

Counsel for plaintiffs below in their brief submit the following proposition, upon which they rely for a recovery: "There was no issue made by the evidence as to deceased having been drunk to the point of insensibility and incapacity, and the court properly did not submit such issue to the jury. There was evidence tending to show that deceased was drunk, that appellant's employees knew he was drunk, and that they knowingly permitted him to go out on the platform and stand on the steps of the car while running at such speed as would make it dangerous for a man in his condition. The court in the fourth paragraph of his charge properly submitted these issues to the jury, and instructed them, if they found such facts from the evidence and such conduct on the part of appellant's employees was negligence from which the accident resulted, to find for appellant." The fourth section of the court's charge is that part of the charge referred to in the beginning of this opinion, and it will be unnecessary to quote it here.

In support of the foregoing propositions we are referred by counsel for plaintiffs below to the following authorities: Fox *v.* Railway Co., 138 Mich. 433, 101 N. W. 624, 68 L. R. A. 336; Wheeler *v.* Railway Co., 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955; Johnson *v.* Railway Co., 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39; Hutchinson on Carriers, § 637. The case of Fox *v.* Railway Co. was a suit for damages for personal injuries alleged to have been received by plaintiff in stepping

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from defendant's train while it was running at a rapid rate of speed. He claimed to have been "beastly drunk," and that defendant's servants, knowing his condition, negligently permitted him to go out on the platform and step from the moving train. The difference between that case and the one at bar is that Fox was "beastly drunk," and defendant's servants were warned not to suffer the plaintiff in that condition to go upon the platform, from which he stepped, thinking the train had come to a stop. In the case we are considering there was no proof that Robinson was beastly drunk, or drunk to insensibility, or to such an extent as to be incapable of knowing what he was about. This is conceded in the proposition of plaintiff's counsel above quoted. Nor was it shown by any testimony that, if Robinson's condition was such as he did not realize that he was in a dangerous position on the platform or steps of the moving train, this was known to any servant of the railroad in charge of the train. In the Fox Case the court makes this statement: "In the case at bar it is shown beyond any reasonable question that the plaintiff, while beastly drunk, was making an effort to go from a place of safety to a place of danger. The attention of the brakeman was called to the situation by a passenger who saw the danger. Instead of going to the drunken man, and attempting to prevent his exit from the car, he went in the other direction. It was not until after the passenger, seeing the failure of the brakeman to act, attempted to prevent the danger, that the brakeman made any effort in that direction. This effort came too late." It seems as if the Fox Case is in line with the rule we have laid down. It clearly does not support the proposition contended for by plaintiff's counsel.

The next case cited and relied upon by plaintiff's counsel is that of *Wheeler v. Railway Co.*, supra, from New Hampshire. That was a case where plaintiff was drunk, and was permitted to dance and stagger in the baggage car with the door wide open and in front of the open door. His condition was known to defendant's servants, and that he was incapacitated to take care of himself. The trial court in that case charged the jury as follows, which charge was approved by the Supreme Court of New Hampshire, and which we think is in perfect accord with the rule laid down in this opinion: "When a man in his senses exposes himself voluntarily to apparent danger, he is not in the exercise of that care which the law makes it the duty of every man to take to prevent injury to himself; and drunkenness will not relieve the plaintiff from the exercise of the care required of people in general. But, while drunkenness will not excuse the exercise of due care on the plaintiff's part, still, if the plaintiff was so completely under the influence of liquor or so drunk at the very time of the accident that he was irresponsible, or incapable of caring for himself, and the de-

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fendant knew of his condition and danger in time to prevent the accident, and did not use due care to prevent it, they were in fault. In this case, while the defendants were not under obligation to accept the plaintiff as a passenger in the condition he tells you he was, still, if they did accept him when they knew he was so much under the influence of liquor that he was irresponsible, or incapable of taking care of himself, under the circumstances in which he was placed, or if they permitted him to remain on their train after they became aware of his condition, it was their duty to use due care to prevent injury to him; and due care would be the exercise of such care as a reasonably prudent man would exercise, situated in precisely similar circumstances as the facts show you existed at the time of this accident. In this case, if the defendants knew the plaintiff's condition, and could have prevented the accident by the exercise of due care, they are in fault; but if the defendants, after they knew of the plaintiff's condition, could not have prevented the accident by due care, they are not in fault. This is predicated on the fact that you find that the plaintiff was so much under the influence of liquor that he was irresponsible or incapable of taking care of himself.' These instructions clearly and forcibly stated the rights and duties of the parties, and the legal principles involved were repeatedly impressed upon the attention of the jury." The case of *Johnson v. L. & N. Ry. Co.*, supra, Alabama case, relied upon by plaintiff's counsel, does not in our judgment support the proposition contended for by them. In that case we quote the following from the syllabus: "Drunkenness does not exempt a person from the responsibility of his own acts; and if the intoxication renders him reckless or indifferent to consequences, and he fails to exercise due care, such failure will not be excused because superinduced by his intoxication. The law exacts from one voluntarily intoxicated the same care and precaution to avoid injury as it does from a sober person of ordinary prudence under like circumstances."

From the view we take of the law applicable to this case, it must be reversed on account of the court's charge as above indicated, and it remains to be determined what further disposition should be made of the case in reaching a correct conclusion. The testimony is conflicting as to whether or not the deceased was drunk, or only under the influence of intoxicants. The evidence tending to show that he was intoxicated to the extent of being incapable of taking care of himself, or of understanding the dangerous position he had assumed, is very scant, if, indeed, there is any evidence tending to show that condition beyond the mere conclusion of some of the witnesses based upon no material fact or substantial reason. While some of

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the witnesses for plaintiff say the deceased "appeared to be drunk," that he talked loud, and that "it was not intelligent," that he staggered around in the car, and cursed and that he waved his hands, no one of all these witnesses for the plaintiff ever stated one word, thought, or thing that the deceased said on that occasion, although they were in a few feet of him, except that he talked loud, cursed, and staggered. On the other hand, a number of witnesses for the defendant say they were on the car in which deceased entered and took his seat, that he came over to where at least two of such witnesses were and talked intelligently to them, asked them where they were going, and, after being told, inquired of the whereabouts of several of his acquaintances, calling them by name. This testimony was undisputed. In addition to this, W. B. McClanahan, a witness for plaintiffs, testified that he was a friend of the deceased, had been with him the day and night before the accident in Paris, Tex.; that deceased on the morning of the accident came to the train by himself, requested the witness to purchase his ticket; that deceased then went off in the direction of a saloon, and afterwards returned alone, and without assistance entered the train and took a seat in the car. It never occurred to this friend of the deceased that he was sufficiently intoxicated as to demand at his hands any assistance or caution. The condition of deceased may be stated from the uncontradicted evidence to be this: "He knew where he was going and what train to go on. He went without assistance to the proper depot in time to procure his ticket to destination. He realized it was necessary to procure a ticket, and requested his friend to purchase his ticket to Hugo for him. When the train arrived, he entered the same without assistance. After entering the car he sat down by his friend. When on the train, he could see, talk, walk, and did not fall down at any time. His talk was intelligent. He was capable of caring for himself. He staggered very little more than a man ordinarily would in walking through a moving train."

After deceased went upon the platform and took his position on the steps of the car, he did it by taking hold of the handhold with his right hand, and securely held himself on the steps, while his body was leaning out from the train as far as it would reach, and was waving his left hand. In this position he was seen by the witness Andrews for more than a quarter of a mile before the train reached Lenoir, and, after the train had passed Lenoir about 150 yards, the body of deceased was found near a switch target with his head practically cut off, and blood upon the switch target.

[2] By all this testimony it is clearly shown that deceased was capable of taking care of himself and realized the danger of the position taken by him on the steps, and met his death only

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from negligence in failing to look for and see the switch target by striking which he undoubtedly was killed. He must have been as conscious of the danger of his position as were the servants of defendant, as, if it existed, it was as obvious to him as to them.

There is no evidence in the record by any witness tending to show that if the deceased was intoxicated to the extent that he was incapable of taking care of himself, or of realizing the danger of his position on the steps of the car, the porter or any other servant of the railroad company knew his condition to be such, unless it should be inferred from the fact that his condition was obvious to all who saw him or heard him talk. That this was true we are not able to say from all the testimony.

[3] If the servants of the railroad company did not know of the extent of Robinson's intoxication, and that he was so intoxicated as to be incapable of caring for himself, or of realizing the danger of the position taken by him, they had a right to assume that deceased knew of any danger that existed by reason of his position on the steps, and that he would use all means to protect himself from injury.

[4] This cause, although upon its second appeal, does not seem to have been fully developed, at least as to the extent of deceased's intoxication at the time of the accident, bringing his case within the rule here laid down, and, as long as there is a probability that a case has for any reason not been fully developed, this court will not render judgment on the insufficiency of the evidence. In other words, it must be apparent to the court that the case has been fully developed, and that there is no probability that any other evidence can be secured before it will render judgment.

The judgments of the Court of Civil Appeals and of the district court will be reversed, and the cause remanded.

LEEK *et ux.* v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, Oct. 28, 1911.)

[118 Pac. Rep. 345.] \

Carriers—Passengers—Ejection.—While plaintiff's wife was traveling on defendant's train as a passenger with her four children, one of them, aged 13, was accidentally killed by a rifle ball, shot by a boy at the train as it was passing him. At the next station, the conductor removed the body of the boy from the train and delivered it to the coroner, and then compelled the wife and her remaining children to leave the train, according to orders from defendant's superintendent. Held that, while defendant was entitled to remove the body of the child, the ejection of plaintiff and her other children was without justification.

Carriers—Passengers—Ejection—Damages.*—Plaintiff's son, while riding with his mother on a train, was killed by a boy with a rifle, as the train was passing. The conductor delivered the body to the coroner, and compelled the mother and her other children to leave the train, though she informed the conductor she had no money to pay necessary expenses. The conductor directed her to go to a ho-

*For the authorities in this series on the subject of the damages recoverable for the wrongful, or improper manner of, ejection of a passenger, see last foot-note of *Louisville & N. R. Co. v. Cottongim* (Ky.), 32 R. R. R. 576, 55 Am. & Eng. R. Cas., N. S., 576 (whether exemplary or punitive damages are recoverable for ejection of passenger); *Chicago, etc., Ry. Co. v. Newburn* (Okl.), 39 R. R. R. 357, 62 Am. & Eng. R. Cas., N. S., 357 (loss of time could not be considered in assessing damages, in absence of evidence as to value of his time); *Louisville & N. R. Co. v. Scott* (Ky.), 39 R. R. R. 466, 62 Am. & Eng. R. Cas., N. S., 466 (passenger ejected from train may not recover for insults and humiliation put on other passengers); *Louisville & N. R. Co. v. Scott* (Ky.), 39 R. R. R. 466, 62 Am. & Eng. R. Cas., N. S., 466 (punitive damages were not recoverable for conduct of conductor, when ejecting passenger, in pushing her down the car steps); *Harvey v. Atlantic C. L. R. Co.* (N. Car.), 37 R. R. R. 165, 60 Am. & Eng. R. Cas., N. S., 165; (\$2,500 was not excessive verdict where plaintiff was ejected from train because he had not exchanged his mileage book coupons for, and presented, a mileage ticket, but had offered to pay his fare); *Schwartz v. Missouri, etc., Ry. Co.* (Kan.), 37 R. R. R. 764, 60 Am. & Eng. R. Cas., N. S., 764 (exemplary damages for ejection from train for rightfully refusing to sign a release of liability); *Brian v. Oregon Short Line R. Co.* (Mont.), 34 R. R. R. 18, 57 Am. & Eng. R. Cas., N. S., 18 (\$750 was excessive verdict for ejection of passenger because of expiration of time limit of ticket); *Taber v. Seaboard A. L. Ry.* (S. Car.), 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60 (unlawful ejection, authorizing punitive damages, was not shown by certain evidence; second foot-note of *Birmingham Ry., etc., Co. v. Turner* (Ala.), 28 R. R. R. 624, 51 Am. & Eng. R. Cas., N. S., 624; first foot-note of *Birmingham Ry., etc., Co. v. Lee* (Ala.), 28 R. R. R. 618, 51 Am. & Eng. R. Cas., N. S., 618; *Brenner v. Jonesboro, etc., Ry. Co.* (Ark.),

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tel, and the citizens made up a purse for her, which she used in paying expenses of the stop-over and purchasing clothing. She telegraphed for her husband, who arrived on the day before she left the town where she was ejected. She paid a hotel bill amounting to \$38, \$20 for clothing, \$4.50 for telegram, \$5 to a physician, and claimed to have lost \$25 on an option on certain real estate caused by the delay. Held, that none of the expenditures proximately resulted from the ejection, and that plaintiffs were only entitled to nominal damages.

Appeal and Error—Excessive Damages—Reversal.—Where plaintiff was only entitled to recover nominal damages, but the jury awarded a verdict of \$500, the judgment will be reversed, without an option to accept a reduced verdict in lieu of a new trial.

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Justice Leek and Wife against the Northern Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Geo. T. Reid, J. W. Quick, and L. B. DaPonte, for appellant.
Davis & Neal, Frank C. Neal, and A. O. Burmeister, for respondents.

MORRIS, J. In an action for wrongful ejection of Mrs. Leek from one of appellant's trains, respondents obtained a judgment for \$500, and the company appeals.

The circumstances are these: On October 16, 1909, while Mrs. Leek with her four children, aged 20, 16, 13, and 9, was a passenger on one of appellant's trains, en route to Tacoma, and while

26 R. R. R. 229, 49 Am. & Eng. R. Cas., N. S., 229 (mental suffering of ejected passengers); *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 28 R. R. R. 629, 51 Am. & Eng. R. Cas., N. S., 629 (additional damages cannot be recovered on account of use of force, in ejecting passenger from street car, made necessary by his resistance); *Missouri, etc., Ry. Co. v. Smith* (Ind. Terr.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688 (\$800 was not excessive verdict, where cripple, compelled to walk with crutch, was unlawfully ejected from train at about midnight, and obliged to walk six or seven miles; and an ejected passenger is entitled to recover for loss of time, humiliation, inconvenience in reaching his destination, and for suffering of mind and body); *Birmingham Ry., etc., Co. v. Turner* (Ala.), 28 R. R. R. 624, 51 Am. & Eng. R. Cas., N. S., 624 (elements of the damage recoverable for ejection of passenger from street car); *Missouri, etc., Ry. Co. v. Smith* (C. C. A.), 25 R. R. R. 50, 48 Am. & Eng. R. Cas., N. S., 50 (elements of damages for wrongful ejection); *Louisville & N. R. Co. v. Fowler* (Ky.), 21 R. R. R. 299, 44 Am. & Eng. R. Cas., N. S., 299 (measure and elements of compensatory damages for manner of ejecting, where there is not question as to right to eject); *Lindsay v. Oregon S. L. R. Co.* (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 616 (humiliation, mental suffering, etc., for wrongful ejection); *De Board v. Camden Interstate Ry. Co.* (W. Va.), 25

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passing through Montana, about a mile east of Big Timber, a fourteen year old boy, with a 22 rifle, shot at the train as it passed him, and instantly killed respondents' boy, then 13 years of age. The train pulled into Big Timber, where the conductor removed the body from the train, and turned it over to the coroner. He then told Mrs. Leek she would have to leave the train, and upon her inquiry as to where she should go, he directed her to go to a hotel. She explained to the conductor that she had no money to pay necessary expenses, to which he replied: "That makes no difference. The superintendent of the road telegraphed me and told you to go there, and you go there." Mrs. Leek then left the train with her family, and went to the hotel, where she remained from Saturday afternoon until Tuesday night. In the meantime an inquest had been held, the body prepared for burial, and her husband, who had been telegraphed for, arrived. Tuesday night the family, with the body of the child, resumed their journey. The citizens of Big Timber, learning of the situation and wishing to express their sympathy for Mrs. Leek in her distress, on Saturday presented her with \$145, which she made use of in paying the expenses of the stop-over, and in purchasing some clothing. Mrs. Leek says she felt humiliated at being an object of charity, and that it made her "feel as though she was on the town." In addition to general damages, special damages, including a \$38 hotel bill, \$20 for clothing, and \$4.50 for telegrams, are pleaded. Prior to bringing suit, a demand was made

R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84 (measure of damages for ejection of street railroad passenger for refusal to pay additional fare after wrongful refusal to accept transfer tendered by him); *Arnold v. Rhode Island Co. (R. I.)*, 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414 (\$175 was not excessive verdict for ejection of passenger after he had presented valid transfer, it appearing that previously he has had trouble in regard to transfers at the same point); *Birmingham Ry., etc., Co. v. Turner (Ala.)*, 28 R. R. R. 624, 51 Am. & Eng. R. Cas., N. S., 624 (\$287 was not excessive verdict for ejection of sick passenger from street car); *Southern Ry. Co. v. Cassell (Ky.)*, 24 R. R. R. 33, 47 Am. & Eng. R. Cas., N. S., 33 (\$1,000 was not excessive for ejection of passenger, where conduct of conductor was unnecessarily humiliating); *St. Louis, etc., R. Co. v. Roane (Miss.)*, 30 R. R. R. 337, 53 Am. & Eng. R. Cas., N. S., 337 (\$7,500 was excessive verdict against carrier for the ejection of two boys from train (one of whom died 3 days later) by quarantine officer); foot-note appended to *Schmidt v. Cleveland, etc., Ry. Co. (Ky.)*, 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149, where all those preceding it in this series are collected; *Cleveland City Ry. Co. v. Connor (Ohio)*, 20 R. R. R. 649, 43 Am. & Eng. R. Cas., N. S., 649 (passenger, ejected from car for refusing to pay fare other than by certain transfer ticket, could recover for the tort); *Ammons v. Southern Ry. Co. (N. Car.)*, 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724 (elements of damages recoverable for wrongful ejection); *Southern Ry. Co. v. Hawkins (Ky.)*, 20 R. R. R. 21, 43 Am. & Eng. R. Cas., N. S., 21 (excessive verdict).

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upon the company for these amounts, in addition to \$5 paid a physician at Big Timber, and \$25 paid for an option on some real estate, which was claimed as lost on account of the delay at Big Timber.

[1] In directing Mrs. Leek to leave the train, the company committed an actionable wrong. It had an undoubted right to remove the body of the deceased child from the train. Its duty to itself, the other passengers, and to the state in which the killing occurred demanded that it do so. But this right and duty did not extend to the removal of the mother from the train. Having paid her fare to Tacoma, she was entitled to be carried to her destination on that train, and leave the body of her slain child with strangers. We apprehend her mother love and instinct would not have permitted her to do so, and that she would have remained with the body of her child. It was, however, for her to determine her action in the matter, and not for the company; and when it assumed to act for her, and dictate what she should do, it committed an actionable wrong, for which Mrs. Leek is entitled to recover damages, compensatory, if proven; otherwise nominal.

[2] The same technical application by which we must determine the right of action in Mrs. Leek must be made use of in ascertaining her proof of damages, and we find none. The payment of the hotel bill, and the purchase of clothing, the only items upon which proof is offered, were not the proximate result of her ejection from the train, but of her awaiting the arrival of her husband, the inquest over the body of her child, and preparing its body for burial. She had the right to remain on the train if she was so disposed, and she had the same right to take the next train, and leave the remains of her child to the tender ministrations of strangers, and thus eliminate the hotel bill and expense for clothing. The ejection from the train was not, therefore, the proximate cause of these expenditures; but it was rather her voluntary choice, pending the inquest and arrival of her husband. If we are to look at it on a cold-blooded, dollar and cent basis, she suffered no pecuniary loss by her stay at Big Timber. She paid a hotel bill of \$38 for herself and family. She expended \$20 in the purchase of clothing for herself and family, which doubtless was used and became of some value subsequent to her leaving Big Timber, and could hardly be called a total pecuniary loss. The citizens of Big Timber contributed \$145 to her. So that financially her stay at Big Timber resulted in no pecuniary loss for which she need be compensated. She says she was distressed at being an object of charity. She was not an object of charity, unless she voluntarily chose to make herself such. She need not have accepted the money, unless she chose. She had telegraphed for her husband, who arrived at Big Timber the day before there was any payment of the hotel

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bill. The railway company is not entitled to any offset because of this contribution by the citizens of Big Timber. Neither can it be charged with any expenditure which was not the direct and proximate result of its act. The poor mother doubtless suffered great grief, and her distress was deep. But, if we could approximate her grief and distress, we apprehend it was caused by the death of her boy, and in sorrow and grief over his untimely end. Mental anguish was undoubtedly hers, but it was anguish at the loss of her son. Such would be the natural and ordinary condition of the average mother under like circumstances, and there is no proof that it was any different in this case, outside of what she terms her distress in accepting the \$145. The jury probably felt the same sympathy for her as did the citizens of Big Timber, but, instead of contributing their own money, they sought by their verdict to enforce a contribution from the railway company. We find no proof of any damage for which the law awards compensation, other than the wrongful act of the railway company in ejecting Mrs. Leek from the train, which act being wrongful, damages are presumed without proof, and she would be entitled to presumptive or nominal damages.

[3] As was said in *Olson v. Northern Pacific Ry. Co.*, 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209, in discussing an ejectment case: "The verdict in this case is out of all reason. There was no financial loss; there was no injury to the person; there was a naked violation of a technical legal right, which would entitle the respondent to little more than nominal damages." Further on in the same case it is said: "We might follow our usual practice and reduce the judgment to such sum as the respondent is entitled to recover in our view of the facts, and require him to accept that amount or submit to a new trial; but the right of recovery is doubtful at best, and the verdict discloses such passion and prejudice on the part of the jury that it would be unjust to hold a litigant foreclosed by any of the findings. The judgment is therefore reversed and remanded for a new trial." The same order should be entered in this case, because of the excessive damages allowed in the verdict. Respondents are entitled to nominal damages; nothing more.

The judgment is therefore reversed, and a new trial ordered.

DUNBAR, C. J., and CROW, ELLIS, and CHADWICK, JJ., concur.

ST. LOUIS, I. M. & S. RY. CO. *v.* WILLIAMS.

(Supreme Court of Arkansas, Oct. 16, 1911.)

[140 S. W. Rep. 141.]

Carriers—Ejection of Passenger—Proximate Cause of Injury.—In an action for being ejected from a train at a point other than a usual stopping place, it appeared that a passenger, having gone beyond his destination, was put off at a point past the succeeding station, and that he not only walked back to the first station, but back to his destination. Held that, as the last walk was not necessitated by his being ejected from the train at a point other than a usual stopping point, injuries resulting therefrom were not a proximate result of the ejection.

Carriers—Ejection of Passenger—Measure of Damages.*—A passenger's measure of damages for being ejected from a train at a point other than a usual stopping place, is the actual injury to his person, and the pecuniary loss suffered by him in walking to the usual stopping point.

Carriers—Ejection of Passenger—Instructions.—A railroad company, having without fault carried a passenger beyond his destination, may put him off at any usual stop; and hence, in an action by a lame passenger, who, having been carried past his destination, was put off a few hundred yards past the succeeding station, an instruction that, if the conductor, knowing that the passenger was lame, stopped the train and ejected him after passing his destination, the passenger might recover for any injury was erroneous, because, in effect, telling the jury that conductor could not put him off if he knew his condition.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by Ewan Williams, by his next friend, Timothy Williams, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. E. Hemingway, E. B. Kinsworthy, and Jas. H. Stevenson, for appellant.

G. F. Chapline and H. A. Parker, for appellee.

HART, J. On the 7th day of August, 1910, Ewan Williams, a boy 19 years of age, bought a railroad ticket from Postelle, Ark., to Palmer Station, a distance of 2½ miles. He boarded one of appellant's trains at Postelle, at about 9:50 o'clock a. m. He says that he had been up nearly all the night before, and was feverish when he boarded the train. That he had a sore hand and a sore

*See foot-note of preceding case.

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leg, and immediately went to sleep. That he was asleep when the train reached Palmer Station, and he did not hear the conductor call out the station, but some time later the conductor came around and waked him up. That he handed the conductor his ticket, and that the conductor pulled the bell cord, telling him that he had passed Palmer Station, and would have to get off. That the train was then just pulling out of Pine City Junction. That he got off the train right close to the end of the Y, about two or three hundred yards north of Pine City Junction. That Pine City is on a railroad that runs from Clarendon to Helena, and from Brinkley to Helena, and is about three miles from Palmer Station. That he could have gotten a train back to Palmer Station at 7 o'clock that evening, but, instead of doing so, he walked back. That he had to stop and rest every now and then, and that it caused him pain to walk. That walking back caused the wound on his leg to inflame and get a whole lot worse. That he suffered a great deal on his way back, and became so sick that he had to go to bed. Plaintiff brought this suit against the appellant, railroad company, to recover damages. The jury returned a verdict for him in the sum of \$200. The railroad company has duly prosecuted an appeal.

Counsel for the appellant insist that the court erred in an instruction given in regard to the duty of the conductor to awaken a sleeping passenger when he reaches his destination. The views we shall hereinafter express render it unnecessary to consider this instruction.

Counsel for the appellee in their brief claim that the action is based on the wrongful ejection of appellee at a point other than a usual stopping place on appellant's line of railroad, and we shall so consider the case.

Section 6591 of Kirby's Digest is as follows: "If any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select."

[1] Waiving the question of whether the putting off the train of the appellee in the yards of the appellant, at a point two or three hundred yards from the station, was the ejection of him at a point other than a usual stopping place, we shall consider the question of his measure of damages under the facts of the present case. The appellee did not prove any pecuniary loss to himself, and whatever personal injury he suffered was the result of his walk back to Palmer Station. His action, as contended by his own counsel, is not based upon the fact that he was carried beyond his destination, but is predicated upon the alleged fact that he was put off the train at a point other than a usual stopping place. The proximate cause of his injury was being put off at a point other than a usual stopping place, and did not re-

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sult from his action in walking back to Palmer Station. This act on his part was not rendered necessary by his being put off the train. Hence we hold that the pain he suffered, and the injury he received as a consequence of his walk back to Palmer Station, was not competent evidence, and was prejudicial to the rights of the appellant.

[2] It will be noted that counsel for appellee in their brief have abandoned any contention that appellee has a right to recover because he was carried beyond his destination, but claim that appellee is entitled to recover because he was put off the train at a point other than a usual stopping place. This is to concede that the railroad had a right to put him off at Pine City Junction. But his counsel now contends that appellant put him off the train 200 or 300 yards beyond Pine City Junction. They do not contend that any violence whatever was used in expelling him. His measure of damages, then, would be the actual injury to his person, and the pecuniary loss proved to have been suffered by him in walking back to Pine City Junction. He did not prove any appreciable amount of damages in either of these respects. *St. L., I. M. & S. Ry. Co. v. Branch*, 45 Ark. 524.

[3] In any view of the case, either treating it as an action to recover damages, because appellant wrongfully carried appellee beyond his destination, or as one for being put off the train at a point other than a usual stopping place, the court erred in giving the following instruction to the jury: "With that, you are also instructed that if you believe from the testimony that the conductor knew that the boy was crippled or lame, and that when he passed beyond his station he stopped the train and ejected him, or put him off, and refused to take him on, and that the plaintiff was damaged by being put off, then he would be entitled to recover whatever the testimony shows he was damaged, and for the pain and suffering caused by the aggravation of the walk." The instruction is faulty, because it in effect tells the jury that if the conductor knew that Ewan Williams was crippled or lame that he did not have the right to put him off the train, regardless of the circumstances under which it was done. If the appellee was carried beyond his station, through no fault or carelessness on the part of appellant, certainly the appellant would not be required to carry him to the end of its line, but might put him off at any usual stopping place, unless the appellee had elected to go further, and had paid his fare to the point he elected to be carried.

The judgment is reversed, and the cause is remanded for a new trial.

MARCOTT v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of Wisconsin, Oct. 24, 1911.)

[133 N. W. Rep. 37.]

Carriers—Carriage of Passengers—Personal Injuries—Temperature of Cars.—To make a carrier liable for injury to a passenger on account of insufficient heating of a coach, it must appear that the condition was negligently permitted to exist, in addition to the fact that a dangerous condition existed; there being no liability unless the carrier has reason to foresee injury to a healthy person by reason of the atmospheric condition of the car.

Carriers—Carriage of Passengers—Temperature of Cars—Evidence.—Evidence held insufficient to show that a railway passenger contracted pneumonia in a Pullman car through insufficient heat.

Appeal from Circuit Court, Marinette County; Samuel D. Hastings, Judge.

Action by Simeon E. Marcott against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The complaint alleges, in substance, that on the 12th day of May, 1906, plaintiff was at the city of Minneapolis, Minn., and, being desirous of returning to his then home in Escanaba, Mich., he purchased of defendant a passenger ticket, good for transportation over defendant's line of road between said points, and he also purchased of the defendant a sleeping car ticket entitling him to a berth in a sleeping car then operated by it between Minneapolis and Escanaba; that he boarded defendant's train about 6:30 p. m. of that day, and it became and was the duty of the defendant to provide for the comfort and health of the plaintiff while so aboard defendant's said train and more particularly to protect plaintiff against the inclemency of the weather, and to keep its cars and train comfortably heated; that notwithstanding its said duty in this regard, and while its said train on which plaintiff was a passenger was passing through the state of Wisconsin, the defendant wholly neglected and refused to provide and furnish heat to its said train and cars, or to any of the cars of said train, although the wind was blowing so cold, sleet and snow were falling, and the temperature was so low and the weather so inclement as to make it dangerous to the health of plaintiff and other passengers then upon said train, because of said failure to keep its said train and cars properly heated; that because of defendant's such failure in that regard plaintiff, while on board said train, contracted typhoid pneumonia, and reached Escanaba, Mich., so sick and ailing that he was confined to his

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bed; that defendant's said train was delayed several hours, and plaintiff became and was much distressed, and suffered great pain on the way; that plaintiff has ever since been, and now is, an invalid because of said disease thus contracted; that plaintiff's lungs have become and are seriously and permanently diseased, and plaintiff is, as a result of the disease thus contracted, sick, sore, and permanently disabled; that plaintiff has suffered and still continues to suffer great pain bodily, and mental pain and anguish, and has been wholly disabled and prevented from earning a livelihood, and has been occasioned and will in the future be occasioned great expense for medicine and physicians, and is informed and believes that he will have to undergo severe surgical operations to preserve his life and alleviate his sufferings, to his damage in the sum of \$50,000.

The answer contains a general denial and an allegation that as to whether the plaintiff was a passenger on one of defendant's trains at the time alleged defendant has no knowledge sufficient to form a belief, and therefore leaves the plaintiff to his proof in that behalf.

The jury returned the following special verdict:

"(1) Did the plaintiff become ill with pneumonia while a passenger in one of the defendant's sleepers on the night of May 12, 1906? Answer: Yes.

"(2) Was said disease contracted while said plaintiff was sleeping in his berth in said car? Answer: Yes.

"(3) If your answer to the second question should be 'Yes,' then answer this: Was said disease caused by the plaintiff, while sleeping, becoming chilled by reason of any cold and damp condition of the atmosphere in the car? Answer: Yes.

"(4) If you should answer the third question 'Yes,' then answer this: Was the condition of said atmosphere such as to render it dangerous for healthy persons to sleep in it protected as passengers were in their berths in said car? Answer: Yes.

"(5) If your answers to the third and fourth questions should be 'Yes,' then answer this: Ought a man of ordinary intelligence and prudence in charge of said car, as the porter was, to have reasonably anticipated that by permitting the atmosphere to become as cold and damp as it was in said car, the health of some healthy person would be injured thereby while sleeping in his or her berth? Answer: No.

"(6) If you should answer the second, third, and fourth questions 'Yes,' then answer this: Did the temperature of said car fall below 60 degrees after the plaintiff retired and before he awakened in the chill? Answer: Yes.

"(7) If you should answer the second, third, and fourth questions 'Yes,' then answer this: Was the chill in which the plaintiff awoke a pneumonic chill? Answer: Yes.

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“(8) If your answer to the second, third, and fourth questions should be ‘Yes,’ then answer this: At what amount do you assess the plaintiff’s damage which resulted directly and proximately from the disease which he contracted while asleep in said car? Answer: \$15,000.”

Upon motions duly made, the court changed the answers to question 2, 3, and 4 from “Yes” to “No,” and awarded judgment upon the verdict so amended in favor of the defendant. Plaintiff appealed.

Martin, Martin & Martin, for appellant.

H. O. Fairchild (*Alfred H. Bright*, of counsel), for respondent.

VINJE, J. (after stating the facts as above). [1] The evidence necessarily took a wide range and is quite voluminous. The questions, however, calling for a decision upon appeal, lie within a narrow compass. The first one is: Was plaintiff entitled to judgment upon the verdict returned by the jury? They found that plaintiff contracted pneumonia upon the train by becoming chilled, owing to the cold and damp condition of the atmosphere in the car; that the condition of the atmosphere was such as to render it dangerous for healthy persons to sleep in it, protected as passengers were in their berths. But they further found that a man of ordinary intelligence and prudence, in charge of the car as the porter was, ought not reasonably to have anticipated that such cold and damp condition of the atmosphere would injure the health of a healthy person sleeping in his berth. There is nothing inconsistent in these findings. They found that a dangerous condition of the atmosphere did in fact exist, but that defendant had no reason to anticipate or know that it was dangerous. To sustain liability it is not enough to show that defendant permitted a dangerous condition to exist. It must also be shown that it was negligently permitted to exist. If defendant had no reason to anticipate any injury to any healthy person by reason of the atmospheric condition maintained, it was not negligent. *Green v. Ashland Water Co.*, 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911. The verdict returned by the jury, therefore, entitled the defendant to a dismissal of the action upon the merits.

[2] Was the trial court warranted in changing the answers to questions 2, 3, and 4 from “Yes” to “No”? As to question 2, it is sufficient to say that the utmost plaintiff can claim from any testimony in the case, including that of his own medical experts, is that the atmospheric condition in the car was such that it might produce pneumonia. None of the experts testified that plaintiff’s pneumonia was, in their opinion, caused by such condition, or that it was reasonably certain that such condition would probably produce pneumonia. Moreover, the consensus of all the medical testimony, and of common observation and experi-

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ence, is that it would require more than three or four hours from the first exposure to fully develop a pneumonic chill, such as the plaintiff had when he awoke the second time. The reasons for changing the answer to this question will appear more fully in the discussion relative to questions 3 and 4. These two questions can be treated together.

Plaintiff, at the time of the alleged exposure, was 42 years of age, in good health, and weighed about 150 pounds. He claims that he felt first-rate when he entered the car at Minneapolis; that he noticed nothing unusual about the temperature of the car at the time he entered; that he rode for a while in the smoking compartment with the window open, but was not subjected to any draft, and did not feel uncomfortable. About 9:30 in the evening he retired, and went to sleep about 10 o'clock. Later he was awakened by a noise like that of a torpedo, heard the trainmen talk, and knew the engine was cut off. He said the car seemed cold, but he called for no additional cover. On cross-examination, he testified the car was comfortable when he awoke, and later, on direct examination, he testified that he then felt all right; that he went to sleep almost immediately; that he thought he slept about an hour or two, but could not tell just how long; that he then woke up with a chill; that it was the chill that woke him up. He was so cold that he shook, and the car seemed cold to him. He asked the porter for heat, and was told the engine was disconnected, and that no more heat could be given him just then. He had a high fever and a headache. He was conscious that some time later the engine came back and coupled onto the train. He said it seemed to him quite a while afterwards. But the uncontradicted evidence of the trainmen, including the engineer, is that, not to exceed 15 minutes after they arrived at the wreck near Ladysmith, the engine of the passenger train was uncoupled, and it proceeded to assist in removing the wrecked engine; that it was engaged in that work not to exceed 50 minutes (some witnesses place it at from 35 to 40 minutes, and the outside limit of all the testimony is 50 minutes); that the engine was then brought back and attached to the passenger train, and the heat connected as usual.

It may therefore be said to be a verity in the case, that from the time when plaintiff first awoke, as they first approached the wreck, to the time of the pneumonic chill, no more than an interval of from 65 to 70 minutes could have elapsed; and it was during this time, it is claimed that he contracted pneumonia. There is practically an entire absence of evidence to show that the temperature of the car was cold or damp or dangerous to sleeping persons during this night. At Barron 30 miles west of Ladysmith, the maximum temperature on the 12th was 76 degrees, the minimum 58 degrees. At Prentice,

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40 miles east of Ladysmith, the maximum temperature on that day was 75 degrees, the minimum 60 degrees. These two places are the nearest to the place of the wreck showing the exact temperature, and it is fair to assume that the temperature at Ladysmith did not differ very materially from that at Barron and Prentice, being in the same latitude and only from 30 to 40 miles distant, west and east, respectively, from these two places. Mrs. Galloway, a passenger upon the sleeper testified that she was dressed in ordinary spring clothes; that she retired about 10 or half past 10 in the evening, undressed, and put on an ordinary sleeping gown; that before she retired she used no wraps or coats; that she was comfortable, noted nothing abnormal about the temperature of the car; and that after she retired she used the ordinary covering of the berth and was comfortable. Miss Holland, another passenger, corroborates this testimony. There were eight or ten other passengers in the car at the time. The porter of the train testified that the temperature of the car did not fall below 60 degrees; that it was from 60 to 65 degrees. Some of the men working about the wreck testified that it rained before the passenger train arrived at the wreck, but that it did not rain while the train was there. Others said there were occasional light showers during the night. All unite in saying that the night was not a cold one; that they were comfortable when standing about the wreck; that there was no sleet or snow, and no unusual wind, or anything to indicate a cold night. The car had double sash and heavy curtains inside of the windows. In the car, before the passengers retired, there were six large acetylene lamps each with four burners, burning in the body of the car and in the ceiling over the aisle. There was also one smaller lamp in the smoker, one in the drawing room, one over the door of the smoking room, and four toilet-room and two aisle lamps. The testimony is uncontradicted that these lamps give out considerable heat; also that after the passengers retired two of these lamps were left burning. One of these four-burner lamps was in front of plaintiff's berth. Each berth had heavy curtains in front, and was furnished with a pair of large heavy woolen blankets and two sheets as covers.

Plaintiff claims there was a sudden drop of temperature in the car. This claim is wholly unsubstantiated by any direct evidence, and also by all reasonable inferences to be drawn from the whole testimony in the case. It does not appear that the doors or windows of the sleeper were open in the evening, except, perhaps some of the deck sash. But, even if they were, in the absence of a strong wind, and there is no evidence of any, it is a matter of common knowledge that such a car, standing upon the track and being sufficiently heated at 11:30 o'clock p. m., so that both plaintiff and other passengers felt comfort-

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able, would not cool suddenly. The cooling would be the result of gradual radiation of heat, and the process would be a slow one. Especially must that be so in an outside temperature of about 58 degrees. So it cannot be said the evidence shows any sudden change in temperature. Indeed, the uncontradicted evidence, and all reasonable inferences that can be drawn therefrom, is to the effect that, if there was a change, it was a slow and gradual one.

On the evening of the 11th plaintiff took a Turkish bath at Minneapolis, and remained in the bathrooms all night. During the day of the 12th he went to different offices and mills in the city of Minneapolis. There was a light shower during the afternoon, but he was not exposed to it. There is an entire absence of evidence as to what exposure, if any, plaintiff had been subjected to previous to the time he left Escanaba for Minneapolis on the night of the 10th. He testified, however, that he never felt better than he did when he left home, and that he felt all right when he left Minneapolis on Saturday evening at 6:30.

The above is a fair summary of all the material evidence concerning the conditions under which plaintiff slept in the car. If any legitimate inference can be drawn therefrom, it must be to the effect that plaintiff's pneumonia was not caused by the atmospheric conditions that obtained in the car while he slept, or while he was awake. But it is not necessary, in order to sustain the action of the trial court, to draw any such inference. If it appears that it cannot be said with any reasonable certainty that plaintiff's pneumonia was caused by the atmospheric conditions of the car, or that they were such as to render it dangerous for healthy persons to sleep therein, protected as the passengers were, then the court's action must be sustained. Verdicts cannot rest upon mere conjecture. They must be bottomed at least upon a reasonable certainty. In this case, under the whole evidence it is a matter of pure conjecture where plaintiff contracted his pneumonia, and the trial court properly amended the verdict and directed judgment for defendant.

Judgment affirmed.

NORTHERN PAC. RY. CO. *v.* MARINOVICH.

(Circuit Court of Appeals, Ninth Circuit, May 15, 1911.)

[189 Fed. Rep. 328.]

Carriers—Injury to Passengers—Flag Station—Creation of Relation—Reasonable Time.*—Plaintiff, desiring to take a train at a flag station where the defendant maintained no agent, inquired at a store when the next train would arrive, and was told that it would come along some time. He went to the waiting room 4 hours and 45 minutes before the train was due to leave, and while there was injured by logs falling from a freight train, which struck the station building and demolished it. Held, that the court properly submitted to the jury whether, under all the circumstances, plaintiff went to the station a reasonable time before train time, so as to be entitled to the rights of a passenger.

Carriers—Injuries to Passengers—Evidence.—Where, in an action for injuries to a passenger while waiting for a train at a flag station, defendant denied that plaintiff intended to become a passenger on its train, and attempted to show that he was a mendicant, and while waiting for a train, as he claimed, had asked for money from a fellow countryman, the court did not err in permitting proof that plaintiff had \$25 on his person at the time, was possessed of \$300 or \$400 in money, owned land in Austria, and to prove by receipts that he had made remittances to his wife there.

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by John Marinovich against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, for plaintiff in error.

Gordon & Askren, David & Westcott, and J. H. Easterday, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

*See first paragraph of foot-note of *Atlantic City R. Co. v. Clegg* (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; foot-note of *Mitchell v. Augusta & A. R. Ry. Co. (S. Car.)*, 39 R. R. R. 154, 62 Am. & Eng. R. Cas., N. S., 154; first head-note of *Messenger v. Valley City, etc., Ry. Co. (N. Dak.)*, 39 R. R. R. 127, 62 Am. & Eng. R. Cas., N. S., 127; last foot-note of *Philadelphia, etc., R. Co. v. Crawford (Md.)*, 38 R. R. R. 14, 61 Am. & Eng. R. Cas., N. S., 14; first foot-note of *Payne v. Springfield St. Ry. Co. (Mass.)*, 33 R. R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186; first foot-note of *Lockwood v. Boston Elev. Ry. Co. (Mass.)*, 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395.

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GILBERT, Circuit Judge. The defendant in error lived at Wilkeson, a station on a branch line of the plaintiff in error's railroad. On the morning of May 12, 1910, he went from Wilkeson by train to South Prairie, 5 miles distant. From there he walked westward on the line of the railroad, a distance of 11 miles, to McMillan, for the purpose, as he testified, of looking at the country with a view to purchasing a piece of land. He arrived at McMillan about noon. At that station there were two stores, and there was a small waiting room for passengers, situated on the right of way of the railroad company. There was no station agent in charge of the waiting room, but in one of the stores the railroad company had an agent, who sold tickets to intending passengers on the road. There was no sign on the store to indicate the presence of such an agent. The defendant in error entered the other store, purchased a luncheon, and inquired when a train would return to South Prairie, and he testified that he was told that it would come along some time. He testified that he did not know about the time of trains going through there, and that he wanted to take the first train to South Prairie. He then went and sat inside the little station house to await the coming of a train, intending, as he said, to become a passenger on the first train to South Prairie. While waiting there, a freight train loaded with logs came by, and when opposite the station a log fell from one of the cars, the forward end of which struck the ground, and the other end remaining on the car, pushed the logs off the car and off the following cars, and some of the logs struck the station building, demolishing it, and severely injuring the defendant in error. For these injuries, the defendant in error recovered a judgment in the court below, on a complaint which alleged that he intended to become a passenger upon the next south-bound train, and that he went to the station for that purpose, and while there waiting for the train, without any fault or negligence on his part, the plaintiff in error carelessly and negligently so operated a train loaded with logs that he sustained serious physical injuries.

[1] Error is assigned to the refusal of the court at the close of the testimony to instruct the jury to return a verdict for the plaintiff in error. The assignment raises the question whether or not the defendant in error was, at the time when he was injured, a prospective passenger, and as such entitled to the rights and the remedies of a passenger upon the road of the plaintiff in error. Upon this question the trial court instructed the jury as follows:

"It is not the policy of the law to require railroad companies to maintain their station facilities for the benefit of persons who at some future time expect to become passengers. There must be some limit as to the right of a person to use a station, with the obligations, or rather with the rights, of a passenger. Now, the

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law does not fix that limit by any number of minutes, or any number of hours, or in any other way. It says reasonable time. What is a reasonable time is a question in this case of fact for you to determine. It depends upon the circumstances of the case. The circumstances here are more or less contested. I will not undertake to state the circumstances pro and con. They have been argued by counsel and appear in the evidence. It is for you to say, under all those circumstances, whether, at the time of the occurrence, it was a reasonable time for the plaintiff to be there intending to take passage upon the next train."

No exception was taken to the instruction; but the plaintiff in error, in support of its contention that the court erred in denying its motion for an instructed verdict, points to the fact that the next train from McMillan to South Prairie was not due until 4 hours and 45 minutes after the time when the defendant in error went to the station, and cites cases which tend to show that a railroad company is not bound to furnish a place of entertainment for persons who may intend, at some future time, to become passengers over its road, and that the relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train which the prospective passenger intends to take. Thus, in *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, it was held that where a person, intending to take passage upon a train, goes into a station within a reasonable time prior to the hour of the departure of the train, in a proper manner, and there, either by the purchase of a ticket, or in some other manner, indicates to the carrier his intention to take passage, from that time on, by waiting for his train, he is entitled to the acknowledged rights and privileges of a passenger. In *Illinois Central R. Co. v. Laloge*, 113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405, the plaintiff went to the depot at 8 o'clock in the evening, and was informed that a train would not be due until 1:05 in the morning. At 10 o'clock he was assaulted in the depot. The court held it was the duty of a carrier to provide facilities for intending passengers within a reasonable time before the departure of its trains, and that by going to the station 5 hours before the schedule time the plaintiff did not become a passenger. In *Andrews v. Yazoo & M. V. R. Co.*, 86 Miss. 129, 38 South. 773, it was held that where one who intended to take a train not due for an hour or more, and who had purchased no ticket, but who had obtained permission from the station agent to do some writing in the office of the station, and while there became involved in an altercation with the agent and was assaulted, the relation of passenger and carrier did not exist.

The cases cited are all cases in which the prospective passenger had the opportunity to know at what time the train which

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he intended to take would start, and they were all cases in which the station was in charge of an agent, from whom such information could be obtained. In the case at bar, no such information was afforded. The defendant in error testified that he was not acquainted with the time schedule of the trains. There was evidence that he had made some effort to ascertain at one of the stores at what time the train would leave; but the information which he seems to have obtained was such as to lead him to believe that the trains were running irregularly, and that a train might come at any time. The railroad company had not placed an agent in charge of the station, and had not taken the trouble to post any notice to advise prospective passengers where information could be obtained. Under all the circumstances, therefore, we are not convinced that the court erred in submitting to the jury the question whether or not the defendant in error took his place at the station within a reasonable time. What is a reasonable time must depend upon the circumstances in the case. The defendant in error had indicated his purpose to become a passenger, by taking his place in the station to await the coming of the train which he intended to take, and on which he was prepared to pay for his passage. His intention was not made known to the carrier, for the reason that the carrier had no agent at the station to represent it. It had not refused him transportation, and it cannot be said that it had not acquiesced in his intention to become a passenger. Its open, unoccupied station house was in itself an invitation to prospective passengers.

[2] Counsel for the defendant in error, in order to show that his client had at the time of the accident money with which to pay for his ticket, elicited the testimony that the defendant in error had \$25 upon his person at that time, and that he possessed \$300 or \$400 in money, and owned some land in Austria, and that he had sent money to his wife in Austria, and to establish that fact he offered in evidence receipts of three such transmissions of money through the post office department. Objection was made to the evidence of the receipts and the ruling of the court admitting the same is assigned as error. The transcript does not inform us at what time the moneys were sent, or what was the amount thereof. It could hardly be said that the admission of such testimony in such a case would be reversible error. But it is clear, in view of the issues and the testimony, that its admission in this case was not error for which the judgment should be reversed. The plaintiff in error, in its answer to the complaint, denied that the defendant in error had intended to become a passenger upon its train, and in the course of the trial had attempted to show that he was a mendicant, and that while he was at McMillan he had asked money

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of a fellow countryman of his. It was not improper, therefore, to show that the defendant in error was not a trespasser on the property of the railroad company, that he had the means wherewith to purchase a ticket, and, as tending to establish the fact that he had earned and possessed money, to prove by the receipts that he had made remittances to his wife in Austria. The judgment is affirmed.

HUMPHREY *v.* MICHIGAN UNITED RYS. CO.

(Supreme Court of Michigan, Sept. 29, 1911.)

[132 N. W. Rep. 447.]

Carriers—Personal Injuries—Insults by Employees.*—Where a passenger's commutation book containing accommodation tickets was erroneously indorsed on its outside cover as void after "June 9th," and each coupon was stamped on its back "June 9th," but on the inside of the front cover the days of the month and year were printed in a position to permit punching out the date of expiration, and this date was correctly punched out as of July 9th, the conductor was bound to carefully examine the tickets, and could not justify an offensive refusal of the book by the rule that a ticket is conclusive evidence as between conductor and passenger.

Carriers—Mental Suffering—Necessity of Injury.†—Allegations of suffering, mortification, and humiliation by the offensive refusal of a conductor to accept a railroad ticket would permit recovery of damages, though no physical injury was alleged or proven.

Carriers—Insult by Employee—Excessive Damages.—Where defendant's railway conductor wrongfully took up a passenger's commutation book, demanded the fare, and said that, if it was not paid, he would put plaintiff off the car, and subsequently returned to plaintiff's seat, where he punched and threw down a cash ticket, remarking that he would show that he was a gentleman and paid plaintiff's fare, the recovery of \$500 for mortification was excessive, and should be reduced to \$100.

Error to Circuit Court, Kalamazoo County; Frank E. Knappen, Judge.

*See extensive note, 38 R. R. R. 322, 61 Am. & Eng. R. Cas., N. S., 322.

†For the authorities in this series on the subject of the right to recover for mental suffering, see last foot-note of *Kyle v. Chicago, etc., Ry. Co.* (C. C. A.), 39 R. R. R. 149, 62 Am. & Eng. R. Cas., N. S., 149; last foot-note of *Jansen v. Minneapolis, etc., Ry. Co.* (Minn.), 39 R. R. R. 111, 62 Am. & Eng. R. Cas., N. S., 111; *Morris v. Lackawanna, etc., R. Co.* (Pa.), 38 R. R. R. 138, 61 Am. & Eng. R. Cas., N. S., 138; last foot-note of *Arkansas M. Ry. Co. v. Robinson* (Ark.), 37 R. R. R. 792, 60 Am. & Eng. R. Cas., N. S., 792.

Humphrey v. Michigan United Rys. Co

Action by Mary Humphrey against the Michigan United Railways Company. From a judgment for plaintiff, defendant brings error. Affirmed conditionally.

On June 8, 1909, plaintiff purchased from defendant a commutation book containing 52 coupon tickets, each good for transportation over defendant's road between Comstock and Kalamazoo. It was the intention of the plaintiff to buy, and of the defendant to sell, a book of tickets good for passage within 30 days from the day of issue. Through the error of the issuing agent, the book was indorsed upon its outside cover "void after June 9th, 1909," and each coupon was stamped upon its back "June 9th, 1909." On the inside of the front cover, the days of the month, the months, and the years are printed around the margin in such position as to conveniently permit the punching out of the date of expiration. This date was correctly punched out as of July 9, 1909. The ticket reads that it is issued to plaintiff "on conditions named in contract attached and made part hereof. This ticket will not be accepted for passage after date expiration as punched out of the margin, which shall in no case be more than thirty days from date of sale, and is worthless if more than one date is punched out or if any alterations are made hereon.

"Contract.

"(6) It is good only if used on or before expiration of date punched in margin of cover and written below and no stop-over checks will be given and it will be taken up by the conductor if presented after expiration of date. * * *

"(8) This ticket is void after June 9th, 1909.

"I have purchased and agree to use this ticket subject to above conditions. [Signed.] May Thompson, Purchaser."

Plaintiff presented this book for passage on June 28th. This was within the date of expiration punched in the cover, but 20 days after expiration, as indicated by the written date upon the outside of the cover and in the contract signed by the plaintiff. The conductor refused to accept the ticket, took it up, demanded the fare, and said, if it was not paid, he would put plaintiff off the car. Plaintiff claimed that the book did not expire until July 9th, that it was good for passage, and that she had no money. The conductor thereupon went to the forward end of the car, and in a short time returned to plaintiff's seat, where he punched and threw down a cash ticket, with the remark: "I will show you I am a gentleman. I will pay your fare." Plaintiff was not ejected from the car, but rode to her destination upon the ticket. Plaintiff brought her action against defendant, claiming in her declaration that the conduct of defendant's agent "caused her great suffering, mortification, and humiliation, and then and there and thereby injured her good

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name and standing among her friends and relations and the people on said car, and amongst all her neighbors and friends with whom she had always stood in good repute, and whose confidence and respect she had always enjoyed." Plaintiff recovered a judgment for \$500, and defendant has removed the case to this court for review.

Argued before MOORE, McALVAY, BROOKE, BLAIR, and STONE, J. J.

Sanford W. Ladd (*Warren, Cady & Ladd*, of counsel), for appellant.

D. O. French, for appellee.

BROOKE, J. (after stating the facts as above). [1] The position of the defendant is that this case is ruled by *Frederick v. Railroad Co.*, 37 Mich. 342, 26 Am. Rep. 531, where this court said: "As between the conductor and passenger, the latter's ticket is conclusive evidence of the extent of the right to travel, and the passenger must produce it when called on as the evidence of the right to the seat the passenger claims." We have no disposition to depart from or modify the law as here announced, but we are of the opinion that the facts in the instant case do not warrant the conclusions reached by defendant. It is urged that the ticket presented upon its face demonstrated that it had expired, and was therefore, as between the conductor and passenger, worthless for passage upon the day of its presentation. This seems to us an untenable contention. Here was a commutation book bearing the date of issue "June 8th, 1909." The date of expiration was properly punched as July 9, 1909, and, while the latter date was improperly and mistakenly printed and written in two other places upon the book as of June 9, 1909, we think it clear that the most casual examination upon the part of the conductor would have convinced him that the date punched, and not that written or stamped, was the proper date and should have controlled.

[2] Defendant next urges that: "No physical injury being either alleged or proven, no damages can be recovered for claimed humiliation and mental suffering." We have held that: "Fright, unaccompanied by any immediate physical injuries, cannot be made the basis of the recovery of damages." *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, and cases there cited. As between a common carrier and its passengers, it is the duty of the carrier to protect the passenger from insulting, abusive, or approbrious language on the part of its servants and agents, and to see to it that such servants and agents treat him respectfully. A breach of this duty affords a ground for action. *Baldwin on Personal Injuries* (2d Ed.) § 301; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.

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W. 557, 46 L. R. A. 549; *La Fitte v. New Orleans City & Lake R. Co.*, 43 La. 34, 8 South. 701, 12 L. R. A. 339. The two cases last above cited and the authorities therein discussed seem to be particularly relied upon by plaintiff. In the first case the defendant's servant was drunk, and addressed the passenger in language slanderous in and of itself. The court there said: "The plaintiff should be protected against hearing obscenity, witnessing immodest conduct, and submitting to wanton reproach." In the second case the servant of the carrier groundlessly charged the passenger with the crime of passing counterfeit money. While there is and should be no doubt as to the principle upon which the liability of the carrier rests in such cases, it is clear that not every dispute arising between the servant of a carrier and a passenger, unaccompanied by abusive or insulting language, will give the passenger a right of action. Good faith and respectful treatment are imperative. Insults and wanton abuse are intolerable and are actionable. Whether the conduct and language of defendant's agent in the case at bar was such as to render the defendant liable was a question of fact for the jury under proper instructions.

Error is assigned upon every paragraph of the charge. We have examined it, however, and we think that the crucial question was properly submitted. The court charged: "I instruct you, gentlemen of the jury, if you find by a fair preponderance of the evidence in the case that the conductor in charge of the car on the morning in question, and while in the performance of his duty as a conductor, made use of impudent and insulting language to the plaintiff, then the plaintiff is entitled to recover. * * * If you do not find that the conductor used such language and insulted and abused the plaintiff, you will find a verdict of no cause of action." The unwarranted threat of the conductor to eject the passenger, though unaccompanied by actual expulsion or molestation, as well as his remark when paying plaintiff's fare, were such acts as would afford a basis for plaintiff's recovery if the jury so determined.

[3] A motion for a new trial was made one of the grounds for which was the claim that the verdict was grossly excessive. This motion was overruled. We here agree with the contention of the defendant. Whether it resulted from passion or prejudice on the part of the jury or not, it is clearly excessive.

The judgment will be set aside and a new trial ordered, unless the plaintiff remits from the amount thereof the sum of \$400, in which event it will stand affirmed.

BOGARD'S ADM'R v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, Oct. 6, 1911.)

[139 S. W. Rep. 855.]

Carriers—Transportation of Passengers—Contagious Disease.—Where a passenger died from measles, communicated to him from a fellow passenger, while riding on defendant railroad train, the carrier was not liable for failure to exercise ordinary care to ascertain that such fellow passenger had a contagious disease, but was only bound to exercise ordinary care to protect decedent from contagion after the affliction of such fellow passenger had been either discovered or called to the attention of the carrier's conductor.

Carriers—Transportation of Passengers—"Proper Persons."*—A carrier, independent of contractual relation, is under a general obligation to receive and carry on its train all proper persons who apply for transportation and offer to pay the regular fare for such service; the term "proper persons" being defined to mean persons whose status or condition apparently entitles them to be carried as passengers.

Carriers—Transportation of Passengers—Persons Not Entitled to Carriage.*—A carrier may refuse to carry passengers whose condition or conduct, from intoxication, disorderly conduct, contagious disease, or other things, is such as to make their presence on the train dangerous to the lives and health of other passengers; and if the condition or conduct of the person, after having been received as a passenger, becomes such as to endanger the lives or health of other passengers, or to unreasonably annoy or offend them, it is the duty of the carrier's servants, on receiving notice thereof, to eject the offending person, exercising due care to protect his health and person from danger or unnecessary discomfort.

*For the authorities in this series on the subject of what persons a common carrier of passengers may refuse to transport, see note, 6 Am. & Eng. R. Cas., N. S., 269 et seq.; note, 11 Am. & Eng. R. Cas., N. S., 833, et seq.; Chesapeake & O. Ry. Co. v. Selsor (Ky.), 39 R. R. R. 739, 62 Am. & Eng. R. Cas., N. S., 739 (Ky. St., § 806, providing for ejection, etc., of disorderly passengers, does not change common-law rule as to what persons carrier must receive as passengers); first foot-note of Denver, etc., R. Co. v. Derry (Colo.), 36 R. R. R. 141, 59 Am. & Eng. R. Cas., N. S., 141 (helpless or blind persons); Louisville & E. R. Co. v. McNalley (Ky.), 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642 (intoxicated persons); Illinois Cent. R. Co. v. Smith (Miss.), 15 R. R. R. 293, 38 Am. & Eng. R. Cas., N. S., 293 (persons suffering from mental or physical disability); Zachery v. Mobile & O. R. Co. (Miss.), 6 Am. & Eng. R. Cas., N. S., 267 (blind person).

Bogard's Adm'r v. Illinois Cent. R. Co

Appeal from Circuit Court, Marshall County.

Action by George W. Bogard's administrator against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Zeb. A. Stewart, for appellant.

Oliver & Oliver, Blewett Lee, C. L. Sivley, and Trabue, Doolan & Cox, for appellee.

SETTLE, J. This action was brought by appellant, as administrator of the estate of his deceased infant son, to recover of appellee damages for his death from measles, alleged to have been contracted by the child, while a passenger on its train, from another passenger on the same coach; it being averred in the petition that this passenger had the measles, that the fact of his having the disease was known to appellee's conductor in charge of the train, or by the exercise of ordinary care could have been discovered by him, and that notwithstanding such knowledge on the part of the conductor, or means of ascertaining that the passenger in question was affected with measles, he negligently failed to inform the child of appellant, or the child's mother, who was with him, of the presence in the coach of the infected passenger, or to cause the latter to leave the coach, that others might not contract the measles from him. Within a week of the arrival of appellant's family at Murray, one of the children became ill with the measles. Two or three days later the infant decedent took the disease, and after an illness of a week died.

It appears from the bill of evidence that appellant and his family resided in Carterville, Ill., that measles were prevailing there, and that he sent his wife and children to Murray, Ky., the home of relatives, that they might escape contagious disease. They were on the way to Murray when they encountered the passenger from whom, it is claimed, the child contracted the measles. According to the testimony of Mrs. Bogard, mother of the infant decedent, and one or two other passengers on appellee's train, the unknown man, alleged to have been afflicted with the measles entered the coach in which they were riding at a station where the train made a stop after leaving Carterville, and that his face manifested an eruption much like the measles. Mrs. Bogard further testified that he took a seat next to and in the rear of the seat occupied by herself and children, and leaned forward with his head resting much of the time on the back of their seat, and that soon after he had thus placed himself the conductor entered the coach and took up his ticket, in doing which he raised the hat from the passenger's head as if to see his face. If the latter then had the measles, it does not appear from the evidence that the conductor discovered it. At any rate, no statement was made

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by him indicating that it then became known to him, nor does it appear from the evidence that it was actually brought to his knowledge while the passenger remained in the coach. The mother of the deceased infant did not claim that she or any other occupant of the coach informed the conductor that the passenger in question had the measles, or was suspected of having the disease, and the conductor, in testifying, denied any knowledge of his having the disease. It is true the inference of such knowledge, arising from his lifting the hat of the passenger as his head rested upon the back of the seat in front of him, might be indulged. But it is equally as reasonable to infer that the conductor supposed the passenger was asleep, and raised his hat for the purpose of awakening him, that he might take up his ticket; and, if so, a cursory view of his face under such circumstances might not have enabled the conductor, unskilled as he was in diagnosing diseases, to discover that its appearance was unusual, or indicative of his being affected with measles. The foregoing evidence was allowed to go to the jury, and, being unconvinced by it that appellee's conductor discovered that the unknown passenger had the measles, their verdict was for the appellee; hence judgment was entered in conformity thereto. Appellant complains of that judgment, and of the refusal of the circuit court to grant him a new trial.

His only material contention is that the court erred in instructing the jury. The alleged error complained of is found in instructions 1 and 2, the second being the converse of the first. Both, in substance, advised the jury that, although they might believe from the evidence the infant decedent died of measles contracted from a fellow passenger on appellee's train, they should nevertheless find for appellee, unless they further believed from the evidence that the conductor in charge of appellee's train knew or discovered that such passenger was afflicted with the measles, in time, and by the use of ordinary care, to have prevented the decedent from contracting the disease, and at the same time protect, as far as the use of ordinary care would enable it to do, the health of the passenger afflicted with the measles.

[1] It is insisted for appellant that appellee is responsible for the death of his son of measles contracted of the fellow passenger, if its conductor knew, or by the exercise of ordinary care could have known, of the fellow passenger's having the measles in time to have prevented the decedent from contracting the disease; whereas, the jury were told by the two instructions in question that actual knowledge on the part of the conductor that such passenger had the measles was necessary, and that appellee was only liable for the failure of the conductor to use ordinary care to protect the decedent from contagion, after discovering that the fellow passenger had the disease. In our opinion the instructions correctly state the law. No liability should be made to at-

tach to a railroad company in a case like this, in the absence of proof that the officers or servants in charge of its train, upon which the person claiming to have been injured was being carried as a passenger, had some knowledge or notice that a passenger thereon was afflicted with a contagious disease and then failed to promptly exercise ordinary care to prevent contagion to other passengers on the train, such as the circumstances would admit of, considering the duty of the railroad company, both to the passenger afflicted with the contagious disease and the passenger entitled to protection against contagion therefrom.

The question here is: When did it become the duty of appellee's conductor to protect appellant's decedent from the injury complained of? Obviously, the moment the conductor discovered there was a passenger aboard the train afflicted with the measles, a contagious disease, calculated to endanger human life or health. Adoption by the courts of the rule of diligence contended for by appellant's counsel would require all carriers of passengers to keep on each of its trains, or at each of its passenger stations, a skilled physician to examine every person obtaining or demanding transportation, to avoid the possibility of receiving a passenger affected with a contagious disease. Neither innkeepers, proprietors of theaters, schools, nor churches, have ever been subjected to such an unreasonable rule of diligence, and no sound reason is perceived for applying it to carriers of passengers. We are not aware that the precise question here presented has ever come to us for decision, but the principle decisive of it has been applied to analogous facts, by this and other courts of similar jurisdiction, in numerous cases.

[2, 3] A common carrier, independently of the contractual relation, is under a general obligation to receive and carry upon its trains all proper persons who apply for transportation and offer to pay the regular fare for such service. By the term "proper person" is meant persons whose status or condition apparently entitle them to be carried as passengers. On the other hand, the carrier has the right to refuse to receive or carry as passengers, improper persons; that is, persons whose condition or conduct is such, from intoxication, disorderly conduct, contagious diseases, or other things, as to make their presence on the train dangerous to the lives or health of other passengers. Likewise, if the condition or conduct of a person, after being received as a passenger, becomes such as to endanger the lives or health of other passengers, or to unreasonably annoy or offend them, it is the right and duty of the carrier's servants in charge of the train, upon receiving notice thereof, to eject such offending person from the train; but in doing so they must also exercise due care to protect his health and person from danger or unnecessary discomfort. In such a case the

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carrier is bound to exercise a reasonable discretion, according to conditions as they reasonably appear at the time. Thompson on Negligence, vol. 3, § 3225.

The principle that must control the servants of the carrier, in a case like the one before us, is correctly stated in the opinion in the case of Clark's Adm'r v. Louisville & Nashville R. R. Co., 49 S. W. 1120, 20 Ky. Law Rep. 1839. In that case Clark was a passenger on the defendant's train. Another passenger took a quantity of gasoline into the same coach in which Clark was riding. It ignited and exploded, by reason of which he was severely injured. The trial court peremptorily instructed the jury to find for the defendant. In the opinion, affirming the judgment, it is said: "It may be stated briefly, in assuming the liability of a railroad to its passenger for injury done by another passenger, only where the conduct of this passenger has been such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers, and in that case asserting it to be the duty of the conductor of the railroad train to use all reasonable means to prevent such injury, and if he neglects this reasonable duty, and the injury is done, that then the company is responsible; otherwise, it is not."

The opinion quotes with approval from the case of Gulf, C. & S. F. R. R. Co. v. Shields, 9 Tex. Civ. App. 652, 29 S. W. 652, in which case the plaintiff was injured by alcohol which had been carried upon the train by another passenger. In the opinion in that case it is said: "It was but a short period of time after the alcohol was spilt when it was set on fire and the accident occurred, and it was not shown that appellant's employees knew that the jug contained alcohol. In fact, it is not shown that the conductor or any other employee knew that Harris had a jug with him until it fell out of a sack, though the conductor had collected his fare, and doubtless knew he had the sack on the seat with him. It cannot be successfully denied that Harris had the right as a passenger to carry baggage in the train, and that he had a right to carry it in a sack if he chose to do so. We think it is equally clear that, in the absence of some intimation or circumstance indicating that the sack contained something dangerous to other passengers, it was not the duty of appellant's conductor or other employees to open the sack and examine its contents." Quinn v. Louisville & Nashville R. R. Co., 98 Ky. 231, 32 S. W. 742, 17 Ky. Law Rep. 811; Wood v. Louisville & Nashville R. R. Co., 101 Ky. 703, 42 S. W. 349, 19 Ky. Law Rep. 924; L. & E. R. R. Co. v. Vincent, 96 S. W. 898, 29 Ky. Law Rep. 1049; Louisville & Nashville R. R. Co. v. Renfro's Adm'r, 142 Ky. 590, 135 S. W. 266.

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A case more directly in point is that of *Long v. Chicago, Kansas & Western R. R. Co.*, 48 Kan. 28, 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. Rep. 271. In that case Long, in purchasing a ticket to ride on defendant's railroad, contracted the smallpox from Clayton, its agent, who sold him the ticket, and he sought to recover of the railroad company damages for the injury thus sustained. The trial court sustained a demurrer to the petition. On the appeal the Supreme Court of Kansas held that the plaintiff was without right of recovery, saying in the opinion: "In this case it is not charged that the railroad company or any of its superior officers knew that its agent at Annis was afflicted with any disease, contagious or otherwise. We do not think that a master or a railroad company is liable in damage to a third person, because such person has contracted a contagious or infectious disease from an agent, when the master or company has no knowledge that the agent is afflicted."

In view of the foregoing authorities, we must express our approval of the instructions given by the trial court in the case at bar, and, as the evidence in the case authorized the verdict returned by the jury, no reason is perceived for disturbing the judgment. It is therefore affirmed.

ST. LOUIS & S. F. R. Co. *v.* BURROUS.

(Supreme Court of Oklahoma, Sept. 12, 1911.)

[118 Pac. Rep. 143.]

Action—Grounds—Injury without Wrong.*—A railway company operating within the scope of its power, has the right to the use of its property and the lawful enjoyment thereof, and if, in the enjoyment of this right, a loss occurs to another, it is a wrong for which there is no liability.

Waters and Water Courses—Natural Water Course—Liability for Pollution.*—A railway corporation which erects a round-house upon its own land, and in connection therewith constructs facilities for bathing its employees and washing its engines, is not liable in dam-

*For the authorities in this series on the question what things connected with the construction or operation of a railroad do, and do not, constitute nuisances, see extensive note, 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519 (effect of legislative sanction, lawfulness of business, and exercise of skill and care); last paragraph of foot-note of *Fowler v. Norfolk & W. Ry. Co.* (W. Va.), 39 R. R. R. 632, 62 Am. & Eng. R. Cas., N. S., 632; first foot-note of *Allerton v. New York, etc., Ry. Co.* (N. Y.), 39 R. R. R. 24, 62 Am. & Eng. R. Cas., N. S., 24; *Clayton v. Minnesota, etc., Ry. Co.* (S. Dak.), 38 R. R. R. 605, 61 Am. & Eng. R. Cas., N. S., 605; *Staton v. Atlantic C. L. R. Co.* (N. Car.), 38 R. R. R. 259, 61 Am. & Eng. R. Cas., N. S., 259.

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ages to persons residing along a natural water course for injuries arising from a stagnant pool upon said water course, formed by the water used by said corporation, and other water naturally flowing into said course gathering in a depression on the land of a third person about four blocks from the place the water from the round house emptied into the water course, if said railway corporation was free from negligence or malice, and used due care in the erection and use of such facilities.

(Syllabus by the Court.)

Error from District Court, Choctaw County; Malcolm E. Rösser, Judge.

Action by W. H. Burrous against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

W. F. Evans, R. A. Kleinschmidt, W. C. Mitchell, and E. H. Foster, for plaintiff in error.

White & Hardison, for defendant in error.

KANE, J. This was an action, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for injury to his real estate, situated one block east, and four blocks south, of the defendant's roundhouse, in the city of Hugo. On a trial to a jury there was a verdict for the plaintiff, on which judgment was duly entered, to reverse which this proceeding in error was commenced.

The evidence disclosed that some time during the year 1903 the defendant erected a roundhouse at the town of Hugo, for the purpose of storing, repairing, and cleaning its engines; this being a necessary incident to the business carried on by the corporation. In washing the engines they were placed over pits constructed in the roundhouse for that purpose, and water was pumped into the boilers, and from thence escaped into the pits. From the pits the water was drained off through a long tile pipe, running south from the roundhouse; there being no sewers in the city. The tile pipe emptied into a natural drain or channel several feet south of the roundhouse, and the water followed this natural drain or channel in a southeasterly course until it entered the premises of one Riggs, four blocks south and one block east of defendant's roundhouse, at which point there was a depression on the Riggs lot which caused the water to spread out, forming a shallow pool, varying in size from time to time. Beyond the pool the channel continued, and the water in ordinary times formed a continuous stream, emptying into Horse creek, about 500 or 600 yards southeast of the pool. In addition to the water that came from the pits, there was another stream from the roundhouse, used by the employees of the defendant for washing their faces and hands, and occasionally

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for bathing purposes. The bathroom water was let out on the surface of the ground, and finally found its way to the natural channel into which the tile pipe from the engine pits emptied, and the two streams united a short distance southeast of the roundhouse, and both, together with the water naturally flowing into the water course, flowed into the pool on the Riggs lot. The stream and the pool swelled or receded, dependent upon the amount of rainfall. At times the stream and the pool would be dry, but owing to the low condition of the ground south of the roundhouse, and especially the low place on the Riggs lot, there was usually a little stream of water extending from the roundhouse to the pool. There seems to be no claim that the cleaning apparatus and the bath were improperly or unskillfully constructed, nor is there any evidence tending to prove that the railway company was negligent or malicious in their use. The evidence shows that the water was pumped into the boilers with a force pump from a clear pond or tank; that the mud and fine scales that accumulated in the boilers were screened off and kept in the pits, and, after the engines were washed, the pits were cleaned, and the scales and mud wheeled outside the roundhouse, so that none of it emptied into the water course; that the water that came out of the tile pipe was clear, and had no unpleasant odor. The evidence as to the character of the water after it left the tile pipe until it reached the pool was conflicting; the plaintiff and several other witnesses testifying that the water was offensive, and smelled bad, while other witnesses testified that the water was clear, and they detected no odor. Under our view of the case, however, that proposition never became material.

[1] It is a well-settled principle of law that a man within the scope of its authority has the right to the use of his property and to the lawful enjoyment thereof, and that, if in the enjoyment of this right a loss occurs to his neighbor, it is a wrong for which there is no liability.

[2] The defendant was engaged in a lawful business, for which it made large expenditures, and, under the rule just stated, it was at liberty to carry on that business in the ordinary way, and was not, while so doing, accountable for consequences which were the natural result of such use. All that can be required is that the property shall be used with due care, so as to give as little annoyance as may be reasonably expected from the nature of the use. It would be unjust to hold a property owner answerable in damages for the reasonable exercise of a right where it is accompanied by a cautious regard for the rights of others, and there is no just ground for the charge of malice, negligence, or unskillfulness. In the case at bar, there is no evidence tending to show that the defendant was malicious, negligent, or unskillful in the erection, maintenance, or use of that

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part of its property used for the purpose complained of, and that was the gist of the plaintiff's case. As far as appears from the evidence, the water used for bathing its men and cleaning its engines was conveyed from a tank or pond of clear water in the most approved and scientific manner, as far as sanitation is concerned, and discharged after its use, free from impurities, through properly constructed channels into a natural water course, which, as far as the evidence discloses, was the most practicable means of disposing of it. Under that state of the evidence, the plaintiff was not entitled to recover. The case of *Barnard et al. v. Sherley*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454, is in point in principle. The question in that case was whether one who sinks an artesian well upon his land and uses the water to bathe the patients in a sanitarium erected by him on said premises is liable to injunction and damages for allowing the water to flow into a stream which is the natural water course of the basin in which the well is situated, and which is the only practicable outlet for the water, if the owner is free from negligence or malice and uses due care in avoiding injury to his neighbors. The court held that: "Where one sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, he is not liable to injunction and damages for allowing the water to flow into a stream which is the natural water course of the basin in which the artesian well is situated; the owner being free from negligence or malice and using all due care in avoiding injury to his neighbor." The principal case is quite exhaustive, and cites a great many cases bearing upon the question involved in the instant case, all of which seem to sustain the conclusion herein reached.

The main question is, Did the railway company exercise due care in the construction, management, and use of its own property? If the facilities used by the railway company for bathing its men, and cleaning its engines, were constructed and maintained with due care and the water discharged after its use in a careful and proper manner into a natural water course, which seems to be the most practicable place for it, the company has discharged its duty to the plaintiff, and is not liable for any consequences that may have arisen from the water thus discharged gathering filth on its way between the place it was discharged from the drain pipe to the pool on the Riggs lot. Ordinarily a case of this kind ought to be reversed and rendered, but, as there seems to have been some confusion as to the exact questions involved, we will reverse and remand it, that it may be submitted upon the right theory, if there is any evidence adduced at the trial to justify it.

The cause is therefore reversed and remanded, with directions to grant a new trial. All the Justices concur.

KNICKERBOCKER TRUST CO. v. ONEONTA, C. & R. S. RY. CO. *et al.*

(Court of Appeals of New York, March 28, 1911.)

[94 N. E. Rep. 871.]

Judgment—Collateral Attack.—A judgment of a court having jurisdiction of the person and subject-matter is binding until reversed, and cannot be collaterally attacked if the court had power to render it.

Receivers—Certificates—Authority to Issue.—The power to order the issuance of receivers' certificates, which are paramount to the lien of strangers to the suit, is of a limited nature, being merely incidental to the court's possession of property or funds, and can be exercised only for the maintenance and preservation of such property, and not primarily for the benefit of any claimant to the fund, so that while the court could have ordered the receiver of a railroad to issue certificates for its maintenance, preservation, and operation, it could not issue certificates to procure funds to discharge overdue interest on a mortgage to prevent foreclosure and resulting loss to the stockholders and creditors of the company, and its order authorizing their issuance was void.

Motions—Collateral Attack on Order—Void Judgments.—Though the court in granting an order necessarily recited that it had power to do so, if it did not have power, the order could be collaterally attacked.

Receivers—Receivers' Certificates—Rights of Purchasers—Notice.—Persons purchasing receivers' certificates, which were made a paramount lien on the property, were bound to take notice of the authority or want of authority to issue them.

Receivers—Receivers' Certificates—Validity—Estoppel to Dispute.—Where the trustee under a railroad mortgage opposed the issuance of receivers' certificates to pay overdue interest on the mortgage bonds in order to prevent foreclosure, and the receipt by him of the money so raised was practically compulsory, the bondholders were not thereby estopped from denying the power of the court to order the issuance of the receivers' certificates for that purpose.

Appeal from Supreme Court. Appellant Division, Third Department.

Action by the Knickerbocker Trust Company against the Oneonta, Cooperstown & Richfield Springs Railway Company and others. From an order of the Appellate Division (138 App. Div. 687, 123 N. Y. Supp. 822), reversing an order confirming a report of a referee, determining that certain claims were entitled to priority over the bonds of defendant named, in payment thereof out of the proceeds of the sale of the property, plaintiff appeals. Affirmed.

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See, also, 117 App. Div. 913, 102 N. Y. Supp. 1139, 90 N. E. 1111.

Henry C. Henderson, for appellant.

Ralph W. Gwinn, for respondents.

CULLEN, C. J. The controversy is between the holders of first mortgage bonds and the holders of certain receiver's certificates over a fund in court arising from a sale in foreclosure under a mortgage upon the railroad.

A judgment creditor of the railroad company, after issue of execution and its return unsatisfied, brought an action in the Supreme Court to sequester the property under the Code of Civil Procedure. Section 1784 et seq., now article 6 of General Corporation Law (Consolidated Laws, c. 23). At that time the trustee under the mortgage had instituted an action for its foreclosure, based on default in the payment of the interest coupons, which action was still pending, but it does not appear that any receiver had been appointed therein. Thereafter, and in July, 1903, the receiver appointed in the sequestration action, upon notice to the trustee under the mortgage, applied for and the court granted an order authorizing the issue of receiver's certificates, not to exceed \$35,000, out of the proceeds thereof to pay the overdue interest on the mortgage bonds, and the fees and expenses of the trustee incurred in the foreclosure suit, "thereby to prevent a default and to prevent the trustee from declaring the whole principal sum to be due, and a consequent foreclosure for such principal and loss to the stockholders and creditors of said company." Such certificates were declared by the order to be a lien on the lands, premises, franchises, and property of the company prior to all other liens and claims thereon whatever, except such other certificates as the receiver might thereafter be authorized to issue. On this application the trustee appeared specially to object to the jurisdiction of the court. After it had failed in its opposition, it appealed to the Appellate Division from the order made by the Special Term, and that order was reversed. 88 App. Div. 208, 84 N. Y. Supp. 427. Meanwhile, and before the order of the Appellate Division, the certificates had been issued and disposed of to various parties, who paid the receiver the amounts represented by them. In the present proceeding the matter was referred to a referee, who reported in favor of the superiority of the claims of the certificate holders. On appeal the Appellate Division has reversed that order and awarded the fund to the bondholders. The appeal from that order is now before the court.

The argument of the learned counsel for the appellants is that, though the order of the Special Term authorizing the issue of

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the certificates was reversed on appeal, nevertheless the rights acquired under it by third parties, in good faith, were not affected by the reversal.

[1] He relies on the general rule, often declared, that a judgment or decree of a court which has jurisdiction of the person and subject-matter is binding until reversed, and cannot be attacked collaterally. This general principle may be conceded, and I shall assume, for the argument, that the powers of the court in a sequestration action are as great as those possessed by it in an ordinary equity action, but the general rule quoted is subject to this qualification, which obtains, not only in criminal cases (*Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211), but also in civil cases (*Kamp v. Kamp*, 59 N. Y. 212; *Bigelow v. Forrest*, 76 U. S. 339, 19 L. Ed. 696; *Day v. Micou*, 85 U. S. 156, 21 L. Ed. 860), that the court must have power to render the judgment made by it.

[2] There is no general power in a court of equity to adjudicate the rights of persons not parties to the action, or to displace or subordinate their liens or other property interests, even upon notice. Ordinarily, to accomplish such a result, an action or proceeding must be brought against the parties affected, and the issues therein tried and disposed of in the usual manner. The power to issue receiver's certificates paramount to the liens of strangers to the suit is of a strictly limited nature, and the theory on which the existence of power at all is based is clearly stated in two decisions of the United States Supreme Court.

In *Wallace v. Loomis*, 97 U. S. 146, 162, 24 L. Ed. 895, that court said: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands."

In *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 455, 6 Sup. Ct. 809, 821, 29 L. Ed. 963, it was said by the court, speaking of a railroad in the hands of a receiver: "It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but, if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of prop-

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erty. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away, if it is not run and kept in good order. Moreover, a railroad is a public concern. The franchise and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice."

This also is the doctrine of the courts of our state. In fact, the whole doctrine is taken over from the federal courts, and the two cases quoted from the United States Supreme Court are cited and followed by this court in *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743. It thus appears that the power is merely incidental to the possession by the court of some property or fund, and can be exercised only for the care, maintenance, and preservation of such property or fund, and not for the benefit or advantage of any particular claimant to the fund, except as such claimant may profit by the maintenance and preservation of the thing itself. The res or thing in the possession of the court in this case by its receiver was the railroad. Receiver's certificates might have been issued for the maintenance and preservation of the railroad, for its repair, the purchase of necessary rolling stock, and the payment of taxes under which the rolling stock might be seized and the operation of the road crippled or prevented. Had the application been made to issue certificates for any of such purposes, and the trustee given notice, it is probable that it would have been concluded by the determination of the court on the necessity of issuing certificates.

The order made in this case, however, showed on its face that the certificates were to be issued for no such object, but to prevent the foreclosure and loss to the stockholders and creditors of the railroad. Probably payment of the defaulted interest and avoidance of a foreclosure would benefit the stockholders and creditors of the company, and so also would the issue of certificates, the proceeds thereof to be paid to creditors, benefit the creditors; but neither would benefit or enhance the value of the railroad or save it from depreciation to the extent of a dollar, and the railroad was the only res in court. Nor would it contribute at all to the proper operation of the railroad, the

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thing in which the public was interested. The effect of the order was simply to pay bondholders by appropriating against their will part of their own property for the purpose.

[3] The order of the court was therefore not only erroneous, but void as in excess of its powers; and, though the court in granting the order necessarily decided that it was within its powers, still the order may be attacked collaterally. *Kamp v. Kamp*, *supra*.

[4] Persons purchasing the receiver's certificates were bound to take notice of his authority to issue the same as a paramount lien. *Union Trust Co. v. Illinois Midland Ry. Co.*, *supra*.

[5] It is claimed the bondholders are estopped by the receipt by the trustee of the defaulted interest from funds raised on the certificates. I think not. The trustee did not consent to obtaining the money for that purpose by the issue of certificates, but opposed it. The money was in the hands of the company or its receiver, and as long as the trustee was offered payment it could not question the source from which it came. It may be the certificate holders were willing to lend the receiver money, even without the security of a paramount lien on the property. A refusal to receive payment on a tender might possibly have discharged the lien of the mortgage to the extent of the interest unpaid. Indeed the receipt of the money was practically compulsory; the bondholders were forced to surrender a cause of action shortly to become due, to wit, foreclosure for the whole principal sum secured by the mortgage, and to leave the railroad for another six months in the hands of adverse parties.

The order of the Appellate Division should be affirmed, with costs.

VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, J. J., concur. HAIGHT, J., absent.

Order affirmed.

OMAHA & C. B. ST. R. CO. *v.* CITY OF OMAHA *et al.* (OMAHA STRUCTURAL STEEL WORKS *et al.*, Interveners).

(Supreme Court of Nebraska, Oct. 6, 1911.)

[132 N. W. Rep. 731.] •

Injunction—Subjects of Relief—Interference with Business.—Where a city, by the affirmative acts of its officers and agents, has for a long series of years authorized and acquiesced in the expenditure of large sums of money and in the acquisition of valuable property by a corporation in establishing and conducting a business enterprise, under a claim or color of right, and contract to and with persons, companies, and corporations to furnish them with valuable and indispensable services, to enable them to carry on their business enterprises therein, a court of equity will restrain the city authorities from ousting the corporation by destroying its property and business without compensation.

Injunction—Scope of Relief—Limitation as to Time.—Evidence examined, and found to require a modification and affirmance of the judgment of the district court.

(Syllabus by the Court.)

• Appeal from District Court, Douglas County; Estelle, Judge.

Action by the Omaha & Council Bluffs Street Railroad Company against the City of Omaha and others, and the Omaha Structural Steel Works and others, interveners. From a judgment for plaintiff and interveners, the defendants appeal. Modified.

H. E. Burnam, I. J. Dunn, and John A. Rine, for appellants.
John L. Webster, for appellee Omaha & C. B. St. R. Co.
M. L. Learned, for interveners.

BARNES, J. Action brought by the Omaha & Council Bluffs Street Railway Company, in the district court of Douglas county, to restrain the city of Omaha and Waldemar Michaelsen, as city electrician, from removing or causing to be removed all of the plaintiff's conduits, wires, and poles located in, under, upon, or over the streets, alleys, thoroughfares, or public places of the defendant city, maintained and used by the plaintiff for furnishing or transmitting electricity to private parties or premises for light, heat, or power purposes.

It appears that when the issues were made up, the Burkley Printing Company, the Omaha Structural Steel Works, the McCord-Brady Company, Hayden Bros., the Klopp & Bartlett Company, the Wilson Steam Boiler Company, the Williams & Mount Company, Frederick J. Wearne (doing business as Wearne Bros.), and Thomas F. Stroud (doing business under the name of T. F. Stroud & Co.), persons, companies, and cor-

porations to whom the plaintiff for many years had been and was then furnishing electricity for those purposes, intervened and joined the plaintiff in its prayer for equitable relief. The cause was tried, and the district court found the facts generally in favor of the plaintiff and the interveners, decreed to them a permanent injunction, and from that judgment the defendants have appealed.

[1] The contention of the parties may be briefly summarized as follows: The defendants claim that the plaintiff company had no franchise or right to occupy the streets, alleys, and public places of the defendant city, but was a trespasser thereon; that, if it had any such right, the business of furnishing electricity to private parties or premises for light, heat, or power purposes is outside of and beyond its corporate powers as a street railway company; that if the plaintiff had, by ordinance or otherwise, acquired any right to engage in that business within the defendant city the right or power so obtained was a mere privilege or license, which could be revoked by the mayor and council of the defendant city at any time, and therefore the judgment of the district court was wrong and should be reversed. On the other hand, the plaintiff contends that it had a franchise as a street railway to conduct its business within the city of Omaha, which extends at least until the year 1917, and therefore it was not a trespasser upon the streets, alleys, and public places of the defendant; that furnishing electricity for power, heat, and light purposes to private persons, including the interveners, is incidental to and might be properly exercised as a part of its corporate powers; that the city had for some 20 years recognized the fact that the plaintiff had such incidental right and power, had in fact granted the same to the plaintiff by ordinance duly enacted by the mayor and city council in that behalf, had regulated the manner of the use of such power, and had ordered the plaintiff to separate its electric current and wires used for that purpose from those used for propelling its street cars, and place the same underground and in conduits; that the plaintiff had complied with such order at an expense of about \$140,000; that the threatened destruction of its property used for that purpose without compensation would result in great and irreparable loss and damage to the plaintiff, as well as to the interveners, and therefore the city was estopped to claim that it had the right to destroy plaintiff's property and business without compensation; that the judgment of the district court was right, and should be affirmed.

It appears from the bill of exceptions that in the year 1866 the territorial Legislature granted to certain persons a corporate franchise, and authorized them to construct and operate a horse railway in the city of Omaha for the period of 50 years; that in 1868 the city council passed an ordinance granting to the

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Omaha Horse Railway Company the right to maintain and operate a single or double track railway over and along such streets within the limits of the city of Omaha as the company might thereafter select, providing the company should conform to the provisions of the act of the Legislature incorporating it; that in May, 1888, there was submitted to a vote of the people of the city of Omaha an ordinance purporting to grant to the Omaha Cable Tramway Company a franchise to construct and operate a cable tramway in the city of Omaha; that the question was submitted to a vote of the people, and the city clerk thereafter certified that the proposed franchise had been carried or adopted; that the Omaha Cable Tramway Company was incorporated for the purpose of building and operating a cable tramway in the city of Omaha, in April, 1888; that in 1889 the Legislature of this state passed a law (Laws 1889, c. 38) authorizing any street railway company existing in pursuance of law in this state, or which might thereafter be organized, whose road had been located and constructed so as to conform with the road of any other street railway company theretofore organized, thus making connected or continuous lines or routes of travel or transportation, to consolidate its railway property and appurtenances with such other street railway, and convert its property and appurtenances into a single corporation; that after such consolidation should be completed the corporation resulting therefrom should by operation of law succeed to and hold in perpetuity all of the property, rights, powers, and franchises conferred upon said constituent companies; that in March, 1889, the Omaha Cable Tramway Company and the Omaha Horse Railway Company, the two corporations which at that time claimed to own and possess franchises in the city of Omaha for the operation of street railways, and which were actually operating street railways in said city, consolidated by adopting and filing articles of incorporation and complying with the requirements of that law; that in 1887 there was submitted to and adopted by a vote of the people of Omaha an ordinance, called No. 1434, proposing to grant to a corporation called the Omaha Motor Railway Company a franchise for a period of 30 years, covering a number of streets in said city (which need not here be further described); that on November 1, 1889, the Omaha Motor Railway Company gave a deed of conveyance to the Omaha Street Railway Company, transferring to that company all of its rights, title, and interest in and to its franchise and street railway interests in the city of Omaha; that on December 5, 1889, the first amendment to what was called the charter of the Omaha Street Railway Company, being the ordinance of consolidation between the Omaha Cable Tramway Company and the Omaha Horse Railway Company, was adopted; that on January 9, 1902, the second amendment to the articles of incorporation or charter of the

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Omaha Street Railway Company was also adopted; that on the 7th day of October, 1902, the stockholders of a corporation called the Omaha & Florence Street Railway Company amended its articles of incorporation, changing the name of that company to the Omaha & Council Bluffs Street Railway Company, and increasing its capital stock from \$200,000 to \$15,000,000; that on the 22d day of November, 1902, the Omaha Street Railway Company by deed conveyed to the Omaha & Council Bluffs Street Railway Company, the plaintiff herein, all of its properties, rights, and franchises, and it is under the foregoing acts, ordinances, and transfers that the plaintiff company claims the right to conduct the business of a street railway in the defendant city.

It will thus be seen that it cannot be said that the plaintiff has no color of right to operate its street railway within the defendant city. It appears, however, that neither the validity of plaintiff's franchise nor the length of its duration was considered or determined by the district court, and defendants in their brief concede that in justice to all of the parties this court should at this time refrain from passing upon those questions. We therefore decline to definitely pass judgment upon them.

It further appears that as early as September, 1882, the city of Omaha, by its mayor and council, recognized the right of any person, company, or corporation to erect and maintain poles upon and along the streets of the city of Omaha for the purpose of transmitting electric current, and by the ordinance granted to the Northwestern Electric Light & Power Company authority to erect poles and conduct wires along the streets of the city for transmitting electric current; by which it was also provided that "the mayor and council may authorize any other company or person to use the wires and poles that may be erected, upon just compensation;" that in May, 1884, the city council passed ordinance No. 756, which was approved by the mayor, regulating the construction and maintenance of wires and conductors for transmitting electric current in the city of Omaha, which was a general regulation applying to the business of transmitting electric current, by wires, which by its terms applied to any person, company, or corporation that elected or chose to transmit electric current for power purposes, and thereby the city of Omaha recognized the right of an electric street railway company, if it chose to do so, to transmit electricity upon wires or conductors for general electric purposes; that in April, 1886, the city council passed ordinance No. 1031, which was duly approved, and the right of electric street railway companies, or of any other person or company, to transmit electric current by wires upon poles or other conduits for any legitimate business was thereby recognized, and to that end the ordinance provided in substance that any person or corporation, before making any excavation in any street or alley, or erecting poles for the placing of electric wires therein, should

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first obtain authority in writing so to do from the chief engineer of the fire department; and any person or company obtaining such permit was thereby authorized, empowered, and entitled to either erect poles or construct conduits for the transmission of electric current for power and other purposes; that an ordinance was passed and approved in December, 1892, defining the duties of the city electrician of the defendant city and establishing rules and regulations concerning electric wires and poles, which provided for the procuring of a license from the city electrician, and gave him the power over and control of all wires that might be used to carry an electric current for either light, heat, or power. It appears that this ordinance applied to all persons or companies generating electric current for either light, heat, or power, and recognized the right of any person, company, or corporation to furnish electricity for those purposes to whom permits should be granted under the terms of that ordinance; that under its terms permits were granted to the plaintiff company and its predecessor, the Omaha Street Railway Company, for the transmission of electric current for light, heat, and power purposes; that the Omaha Street Railway Company began the sale of electric current for power purposes in February, 1892, and for lighting purposes in June, 1892; and the Omaha Street Railway Company and its successor, the Omaha & Council Bluffs Street Railway Company (the plaintiff herein), continued to furnish electric current for light, heat, and power purposes to its customers from 1892 to the present time; that as early as 1893 the Omaha Street Railway Company began selling electric current to the board of education of the city of Omaha, to be used for power purposes, and the plaintiff company has continued so to do until a recent date; that under and by the terms of the ordinances above mentioned the plaintiff has contracted with and has furnished electric current to the interveners and others, by and with the consent of the city, and under the direction of the city electrician, and has complied with the regulations and ordinances of the city in that behalf.

It further appears that the city by ordinance required the plaintiff company to place its wires used for carrying electric current for power, light, and heat purposes in conduits underground; that by section 1 of an ordinance passed and approved in March, 1902, it was provided: "That all persons and companies owning, maintaining or operating electric wires or other wires in the city of Omaha and in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall, on or before the 1st day of October, 1906, place underground all such wires, and after said date no person or companies shall be permitted to maintain in said district in any streets, alleys, or public grounds of said city, any electric or other wires, without first complying with the provisions of this

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ordinance, excepting, however, such feeder and trolley wires as may be used for propelling street cars and telephone and telegraph wires;" that the ordinance above quoted was intended and did apply to the plaintiff herein, and that thereafter the plaintiff complied with its terms by separating its wires used for the purpose of transmitting electricity for power, heat, and light purposes from those used for propelling its street cars, purchased and installed machinery to that end, and placed its wires in conduits underground at a large expense, approximating \$140,000; that the plaintiff in furnishing electricity to the interveners and others has since complied with all of the rules and regulations adopted by the defendant city and its electrician; that the interveners, relying upon existing conditions and the facts above stated, have for many years obtained the electric power necessary to conduct and carry on their several lines of business in the city of Omaha, and under present existing conditions are unable to obtain such electric power from any other source.

We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business which it has thus fostered and encouraged without compensation, and also deprive the interveners of their contractual rights therein.

A like question was before us in the case of *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336, where it was said: "The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter." This is a well-recognized rule of equity, and is supported by *City of Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; *Chicago & N. W. R. Co. v. West Chicago Park Commissioners*, 151 Ill. 204, 37 N. E. 1079, 25 L. R. A. 300; *Village of Winnetka v. Chicago & M. E. R. Co.*, 204 Ill. 297, 68 N. E.

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407; City of De Kalb *v.* Luney, 193 Ill. 185, 61 N. E. 1036; Spokane Street R. Co. *v.* City of Spokane Falls, 6 Wash. 521, 33 Pac. 1072; Town of New Castle *v.* Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516; City of Sioux City *v.* Chicago & N. W. R. Co., 129 Iowa, 694, 106 N. W. 183, 113 Am. St. Rep. 501; Gregsten *v.* City of Chicago, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496; People *v.* City of Rock Island, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179. We deem further citation of authorities in support of this rule unnecessary. We are of opinion that the facts of this case bring the defendants within the rule of State *v.* Lincoln Street R. Co., *supra*, and therefore the judgment of the district court should be affirmed.

[2] Finally, it is suggested by the defendants that if the judgment of the district court should be affirmed the injunction awarded should be modified. We think there is much force in this contention. It appears that the injunction by its terms was made perpetual, and if not modified may be at some future time construed so as to forever prevent the city from ousting the plaintiff from its streets and alleys under any circumstances. It seems clear that the operation of the order of injunction should not extend beyond the date of the expiration of the plaintiff's franchise, and that the defendant should only be restrained from interfering with or destroying the plaintiff's conduits, poles, wires, and other property without compensation while the present conditions exist, and until the expiration of the plaintiff's alleged or colorable franchise.

It is therefore ordered that the injunction be so modified, and as thus modified the judgment of the district court is affirmed.

SEDGWICK, J., concurs in affirming the judgment of the district court.

GOLDEN v. SPOKANE & I. E. R. Co.

(Supreme Court of Idaho, Nov. 6, 1911.)

[118 Pac. Rep. 1076.]

Death—Actions for Causing—Damages—Loss of Superior.*—In an action by the father for the wrongful death of a son seven years of age, caused by collision on the railway, where it is admitted that the death occurred through the negligence and carelessness of the servants of the defendant, the value of the child's services to the father during the period of his minority should be ascertained by the jury from the evidence introduced and by using their own judgment, common sense, and discretion, as an estimate of such services must of necessity to a considerable extent be a matter of opinion.

Death—Actions for Causing—Damages—Nominal Damages.*—In such cases the parent is entitled to recover more than nominal damages.

Death—Actions for Causing—Excessive Damages.—A verdict of \$4,000 for the death of a bright, healthy, active boy of seven years of age is not excessive under the facts of this case.

Appeal and Error—Review—Harmless Error—Instructions.—While it was error for the court to instruct the jury that they should find for the plaintiff any sum that he might reasonably expect to receive from such son after coming of age, "if any such is shown by the evidence," when no such sum is claimed in the complaint and no evidence whatever had been introduced upon that question, held not reversible error.

(Syllabus by the Court.)

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Thomas Golden against the Spokane & Inland Empire Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. G. Graves and *Whitla & Nelson*, for appellant.

McFarland & McFarland, for respondent.

SULLIVAN, J. This is an action to recover damages for wrongfully causing the death of Darrell Golden, the minor seven year old son of the respondent. The death was caused by a wreck on the railroad of the appellant. The liability of appellant for the death of said child is admitted, or is not disputed, and the only

*For the authorities in this series on the subject of the damages recoverable by a parent for the death of or injury to a child, see last paragraph of foot-note of *Hendrickson v. Louisville & N. R. Co.* (Ky.), 35 R. R. R. 774, 58 Am. & Eng. R. Cas., N. S., 774.

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question involved is the amount of damages that the plaintiff is entitled to recover in this action. The cause was tried by the court with a jury, and the jury returned a verdict in favor of the plaintiff for the sum of \$4,145, \$145 of which was for the expenses of the burial of the child, and judgment was entered for that amount on said verdict. A motion for a new trial was denied, and the appeal is from the judgment and order denying a new trial.

Several errors are assigned, but those upon which the appellant relies are to the effect that the evidence is insufficient to support the verdict; that the verdict is excessive and was given under the influence of passion and prejudice; and that the court erred in giving instruction No. 3.

[1] As to the first assignment of error, the evidence shows that the child in question was about seven years of age; that the plaintiff, the father of the child, was about 61 years of age at the date of the death of the child; that his life expectancy, according to the standard mortuary tables, was 12.26 years; that the child was a bright, healthy, active child, and the pet of the family; that the plaintiff had 14 children, 12 of whom are still living. That being the substance of the evidence, while the plaintiff admits its liability, it claims that the judgment is excessive. It is urged that as the plaintiff had so many children older than the one in question, if plaintiff required comfort and support from his children in his declining years, the burden would fall upon the older children rather than on this young child. It is also contended that according to the plaintiff's life expectancy, as established by standard tables, he would live only 12.26 years. That, added to the age of the boy, would make him about 19 years of age when the father would die, and it is contended that the child could not possibly earn for his father during those 12 years \$4,000, over and above the necessary expenses of caring for the child.

In an action for the wrongful death of a child, it is well recognized that the actual benefit that the parent might receive from the services of the child during his minority cannot be specifically ascertained to the dollar by the jury, and it is a well-recognized rule that the jury should in such cases ascertain as best they can from the evidence introduced, and by using their own judgment, common sense, and sound discretion, the value of such services. An estimate of such services must of necessity be a matter of opinion, and it was held in *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85, that no expert testimony on that question would be better than the judgment and common sense of the jury. Upon the question of damages, where different minds might honestly and probably would differ and arrive at different results, and nothing inconsistent with the exercise of good judgment appears in the record, the appellate court will leave the verdict as the jury found it. *Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9.

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[2] It is also well recognized that, where the death of a child is caused by the negligent and wrongful acts of the defendant, the parent is entitled to recover more than nominal damages. It was held in *Taylor, B. & H. Ry. Co. v. Warner* (Tex. Civ. App.) 31 S. W. 66, that a verdict of \$5,000 for the death of a bright, healthy, and industrious boy seven years old was not excessive.

[3] We cannot say that the judgment in the case at bar is excessive, or that its amount would indicate that it was arrived at through prejudice or passion.

[4] Instruction No. 3, the giving of which is assigned as error, is as follows: "The court instructs the jury that, in estimating the damages sustained by the father by reason of the death of his infant child, the jury may estimate such damages upon the basis of what the son's services would have been worth to his father from the date of the injury to the time he would have arrived at the age of 21 years, with any sum that he might reasonably expect from such son after coming of age, if any such is shown by the evidence, deducting therefrom the costs and expenses of the father in his support and maintenance during his minority."

Counsel contends that "two pernicious errors stand boldly out in this instruction," the first of which is that under the pleadings and evidence plaintiff was not entitled to damages on account of any sum which might be supposed his son, if he had lived, would have given him after attaining majority, and that the only allegation of the complaint relating to damages for loss of services is to the effect that said son was capable of earning for plaintiff before arriving at maturity large sums of money by physical and mental labors, and energies, thereby adding greatly to the wealth, welfare, comfort, society, and happiness of plaintiff. Said allegations referred to the earnings of the child before arriving at maturity, but we find substantially the same allegations, aside from the expression, "before arriving at maturity," in paragraph 8 of the complaint. However, viewing the matter as we do, we think it was only intended to claim damages up to the maturity of the child or up to the time he arrived at the age of 21 years, and there is no evidence whatever in the record that would justify the jury in finding that the appellant would receive any financial benefit whatever from the deceased child after he had arrived at the age of majority. That clause in the instruction, to wit, "with any sum that he might reasonably expect from such son after coming of age, if any such is shown by the evidence," should not have been given; but as it was not shown anywhere in the evidence, nor hinted at, that the plaintiff reasonably might expect any sum of money from such son after he became of age, we do not think that the giving of said clause as a part of said instruction is reversible error, for, if the jury followed that part of the instruction, they certainly did not include in their verdict any sum

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of money that the plaintiff might have received after his son became of age. Instructions of that kind ought not to be given to the jury unless they are applicable to some evidence adduced on the trial.

The judgment will be affirmed, with costs of this appeal in favor of respondent.

STEWART, C. J., and AILSHIE, J., concur.

ST. LOUIS SOUTHWESTERN RY. CO. *v.* MITCHELL *et al.*

(Supreme Court of Arkansas, Oct. 16, 1911.)

[140 S. W. Rep. 136.]

Railroads—Trespassers—Injury Inflicted by Brakeman—Liability.*—If, in the line of his duty, a railway brakeman shoots a trespasser in ejecting him from a train, the company is liable.

Railroads—Trespassers—Injury Inflicted by Brakeman—Evidence—Sufficiency.†—Evidence held to sustain a finding that defendant's railway brakeman shot plaintiff, in ejecting him from a train, in the line of duty.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Consolidated actions by Osceola Mitchell and by his father against the St. Louis Southwestern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

S. H. West and *J. C. Hawthorne*, for appellant.

C. F. Greenlee, for appellees.

McCULLOCH, C. J. Osceola Mitchell, a negro boy about 18 years of age, attempted, with a companion, to board a slowly moving freight train on defendant's road near Fargo, Monroe county, Ark., and he claims that one of the brakemen on the train shot him with a pistol, and inflicted a severe wound on

*See foot-note of *Everingham v. Chicago, etc., R. Co.* (Iowa), 39 R. R. R. 4, 62 Am. & Eng. R. Cas., N. S., 4; *Berryman v. Pennsylvania R. Co.* (Pa.), 38 R. R. R. 728, 61 Am. & Eng. R. Cas., 728; *Moore v. Atchison, etc., Ry. Co.* (Okla.), 37 R. R. R. 776, 60 Am. & Eng. R. Cas., N. S., 776.

†For the authorities in this series on the question, what acts are, and are not, within the scope of the employment of a railroad employee, see last foot-note of *Alabama, etc., Ry. Co. v. Sampley* (Ala.), 38 R. R. R. 528, 61 Am. & Eng. R. Cas., N. S., 528; first foot-note of *Duvall v. Seaboard A. L. Ry.* (N. Car.), 36 R. R. R. 532, 59 Am. & Eng. R. Cas., N. S., 532; last head-note of *Heilig v. Southern Ry. Co.* (N. Car.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501; second head-note of *Conchin v. El Paso, etc., R. Co.* (Ariz.), 36 R. R. R. 192, 59 Am. & Eng. R. Cas., N. S., 192.

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his leg, which caused him to fall from the train and resulted in serious injury. He instituted this action against the defendant railway company to recover damages, basing his right of action on the alleged misconduct of one of defendant's brakemen on the train. His father also instituted a similar action to recover damages on account of his alleged loss of the earnings of his son during minority. The two actions were consolidated, and a trial resulted in a verdict for damages in favor of each plaintiff.

[1] The defendant appealed, and insists that the evidence is not legally sufficient to sustain the finding, either that the shot was fired by a brakeman, or that the brakeman was acting within the line of his duty when he fired the shot. These are the only questions raised on the appeal. The finding of those facts justify a recovery of damages. *Railroad Company v. Hendricks*, 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220; *St. L., I. M. & S. Ry. Co. v. Grant*, 75 Ark. 579, 88 S. W. 580, 1133; *St. L., I. M. & S. Ry. Co. v. Pell*, 89 Ark. 87, 115 S. W. 957.

[2] We are of the opinion that there was sufficient evidence to justify a finding in favor of the plaintiff upon both of the issues named above. Plaintiff Osceola Mitchell and other witnesses testified that the party who fired the shot was in the position of a brakeman and had on a brakeman's badge. The train was a through freight, and had three brakemen, besides the conductor. It was a very long train, probably three-fourths of a mile long. The conductor and two of the brakemen testified in the case, and each of them stated that he heard no shot fired and knew nothing of any one being shot; but one of the brakemen testified that he ejected two negro boys from the train a mile or two above Brinkley. The other brakeman was absent; but it was agreed that he would testify, if present, that he did not see plaintiff Osceola Mitchell, and did not shoot him, and knew nothing about the shooting. None of the trainmen testified about any one else being on the train except the trainmen; that is, the conductor and three brakemen. In this state of the case, together with the testimony adduced by the plaintiff that the shot was fired by a man on the train in the position of a brakeman and wearing a badge, it was a fair inference for the jury to draw that the shot was fired by one of the brakemen. There is direct testimony to the effect that persons were not permitted to ride on through freight trains, and that the brakemen were authorized to eject persons found riding or attempting to ride on the train.

Judgment affirmed.

MEADE v. DETROIT, J. & C. RY.

(Supreme Court of Michigan, May 8, 1911.)

[130 N. W. Rep. 1114.]

Evidence—Hearsay.—Plaintiff, a street car conductor, sued for injuries in a collision with another car, claimed to have resulted from the train dispatcher's negligence in directing plaintiff to run to S. switch, without directing the other conductor to hold his car there. It appeared that train orders were given by telephone; the conductor and the motorman going into the telephone booth to receive the order, and the conductor repeating it back verbatim, so the motorman could hear it. A witness who sat about four feet from the telephone booth when plaintiff and his conductor entered it to receive the dispatcher's "meet" orders, about half an hour before the collision, was permitted to testify that she heard plaintiff repeat back to the dispatcher, "Meet at S." Held, in view of the system adopted for transmitting train orders, that all persons, including the employees who witnessed the transaction, could testify thereto as a part of the transaction, and the testimony of such witness was properly admitted, not being hearsay.

Appeal and Error—Objection Below—Improper Argument.—Alleged improper argument will not be considered on appeal, where the record does not show that the objection below on that ground was passed upon by the trial court.

Error to Circuit Court, Washtenaw County; Edward D. Kinne, Judge.

Action by George H. Meade against the Detroit, Jackson & Chicago Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before HOOKER, MOORE, McALVAY, BROOKE, and BLAIR, J. J.

M. J. Cavanaugh and *George J. Burke* (*Corliss, Leete & Joslyn*, of counsel), for appellant.

John P. Kirk and *Arthur Brown*, for appellee.

McALVAY, J. This is a personal injury case in which plaintiff recovered a judgment against defendant upon the verdict of a jury.

The statement of facts and claims of the parties presented in appellant's brief is as follows:

"Claim of plaintiff may be briefly stated as follows: That on the 28th day of April, 1908, the defendant was operating a line of interurban cars east and west from the city of Detroit to the city of Jackson, over its line of railway, passing through

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the cities of Wayne, Ypsilanti, and Ann Arbor; that on said line of railway, about two miles east of Ypsilanti, was located a switch known as Harris, and about a mile and a half east of Harris switch a switch known as Burrell, and about a mile-east of Burrell a switch known as Smith, at which said switches its cars going east passed those going west; that on said day the plaintiff, George H. Meade, was in the employ of the defendant as conductor on one of its said interurban cars known as No. 103, and was running the same over its said line from said city of Jackson to said city of Detroit; that said line of railway consisted of a single track; that on said day one L. A. Harrington was in the employ of the defendant as its train dispatcher, located at Ypsilanti, and as such directed the movement of such cars as were not running upon scheduled time; that on said day one George Cullom was in the employ of defendant as conductor of one of its cars, known as No. 44, and was engaged in running the same from Detroit west to Jackson; that one Isa Fay was in the employ of defendant as a motorman of said car 103 under charge of plaintiff, and one George Wingrove was in the employ of defendant as motorman of said car No. 44, in charge of said Cullom; that between said switch known as Burrell's switch and said switch known as Smith's switch a head-on collision took place between said car No. 103 going east, in charge of said plaintiff, and said car No. 44 going west, in charge of said Cullom; that as a result of said collision said plaintiff was injured; that the cause of said collision was the negligence of said Harrington, said train dispatcher of defendant in directing said plaintiff to run his car from Ypsilanti to said Smith's switch, and omitting to direct said Cullom to hold his said car at said Smith's switch until plaintiff's car had passed said switch.

"The claim of defendant may be briefly stated as follows: That said Harrington did not direct plaintiff to run his car to Smith's switch; but, on the contrary, cautioned plaintiff at Ypsilanti to remember said car No. 44 at Harris' switch, and directed him when he reached the latter place to call up the dispatcher for further orders; that plaintiff's injury was due to the negligence of himself, or that of his fellow servants, Cullom, Wingrove, or Fay."

Plaintiff accepts these statements, with the addition that train No. 103 was known as a limited, while train No. 44 was known as a local, and that motorman Fay is sometimes called Pretchett in the record. This accident occurred east from Ypsilanti, at which place plaintiff reported, and a running order was given to him. The dispute in the case between plaintiff and defendant is whether the order actually given was to meet No. 44 at Harris switch, as the train dispatcher claims, or, as plaintiff

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claims, at Smith's switch, some miles further east. A new train schedule had gone into effect on the day of the accident.

[1] The errors assigned and relied upon relate, first, to the admission of the testimony of Mrs. Bassett, a witness for plaintiff, who was allowed to testify as to what she heard on the day in question, when plaintiff, and Fay, the motorman, were in the telephone booth, reporting and receiving orders from the train dispatcher. The telephone used by the railway company was in a booth separated from her place of business by a board partition. Her testimony was that she saw this car come in on that day from the west, and saw the plaintiff and the motorman go to the booth. She was sitting about four feet from the booth and heard what was said. She testified that it was the custom of the conductors to always repeat back the orders that were given, so that the motorman could hear. She was asked to state what she heard plaintiff say over the telephone relative to his orders, and defendant objected to any such testimony as incompetent and hearsay. The court overruled the objection and witness testified: "Meet at Smith's." This was all that she remembered. She heard of the accident not more than half an hour after plaintiff was in the booth.

There is no dispute between the parties as to the method of giving train orders by telephone. Mr. Harrington, the train dispatcher, described in detail how orders were given by him to conductors and repeated back to him, and that they were written down by his assistants, in his presence, just as he gave them. This witness was not undertaking to testify as to a statement made by Harrington, the train dispatcher, to the plaintiff. She was testifying as to what plaintiff said while in the telephone booth. That a conversation between plaintiff and the officer of defendant was had at the time and place is undisputed. Mr. Harrington gave an order to plaintiff which, according to rule, was repeated back to him by plaintiff, and then Harrington called "correct," which was repeated by plaintiff.

Defendant had provided a method of giving orders by telephone and with witnesses at each end of the line to verify such orders. The scheme of such operations of trains would miscarry, if the safeguarding by witnesses were eliminated. This was the theory of the defendant. The train dispatcher and his assistants were sworn to sustain the defendant's contention as to the order given. Both assistants testified what was said by him over the wire to plaintiff. It cannot be contended that the motorman, Fay, could not have testified. The system adopted had made these parties all witnesses to the transaction, and their testimony is admissible, not as to declarations made by the parties as part of the *res gestæ*, but necessarily as part of the transaction itself. We know of no rule of evidence

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which would make the assistants and the motorman competent to testify and exclude others who had also heard one end of the conversation. This testimony was not hearsay and was admissible.

[2] The defendant further assigns error based upon improper argument by counsel for plaintiff to the jury. The record does not show that the matter was called to the attention of the court and that it was passed upon. It is the duty of counsel to make such a record as will show that the objection made to arguments of counsel was passed upon by the court.

The judgment of the circuit court is affirmed.

OKLAHOMA CITY RY. CO. *v.* BARKETT.

(Supreme Court of Oklahoma, Sept. 26, 1911.)

[118 Pac. Rep. 350.]

Negligence—Contributory Negligence—Last Clear Chance.*—In an action for damages on account of the alleged negligent act of defendant, it is error for the court to charge the jury that the plaintiff may recover notwithstanding his contributory negligence, if the defendant failed to exercise reasonable care to avoid the injury after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent.

(Syllabus by the Court.)

Commissioner's Opinion. Division No. 1. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Saida Barkett against the Oklahoma City Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shartel, Keaton & Wells, for plaintiff in error.

Wm. L. McCann and *S. A. Byers*, for defendant in error.

*For the authorities in this series on the last clear chance doctrine, see last fourth foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767, fourth foot-note of *Wilson v. Illinois Cent. R. Co.* (Iowa), 39 R. R. R. 282, 62 Am. & Eng. R. Cas., N. S., 282; second head-note of *Adams v. Arkansas, L. & G. Ry. Co.* (La.), 39 R. R. R. 254, 62 Am. & Eng. R. Cas., N. S., 254; last foot-note of *United Rys. & Elec. Co. v. Kolken* (Md.), 39 R. R. R. 52, 62 Am. & Eng. R. Cas., N. S., 52; second head-note of *Edge v. Atlantic C. L. R. Co.* (N. Car.), 38 R. R. R. 737, 61 Am. & Eng. R. Cas., N. S., 737; last head-note of *Louisville & N. R. Co. v. Trisler* (Ky.), 38 R. R. R. 650, 61 Am. & Eng. R. Cas., N. S., 650; second foot-note of *McCormick v. Ottumwa Ry. & L. Co.* (Iowa), 36 R. R. R. 350, 59 Am. & Eng. R. Cas., N. S., 350.

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AMES, C. The question involved in this case is whether or not there was error in giving the following instruction: "The duty of the plaintiff to use ordinary and reasonable care in crossing a railroad track is the same in degree and kind as the duty of the defendant to use ordinary and reasonable care in the operation of its cars, and even though the defendant failed to use such care, and the accident would have happened had such care been used by it, still the plaintiff cannot recover if she herself failed to use ordinary and reasonable care, and but for her failure the accident would not have happened, unless it further appears from the evidence that, notwithstanding such negligence on the part of the plaintiff, the defendant failed to exercise reasonable care to avoid the injury after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent. Excepted to by defendant, and defendant moves to modify this instruction by striking out the words 'or by the exercise of reasonable care might have discovered' and excepts to the refusal of the court to so modify the instruction." The particular error alleged by the plaintiff in error is inserting the words, "or by the exercise of reasonable care might have discovered."

The plaintiff and defendant both had a right to use the streets of the city. Therefore at the time of the accident they were in the exercise of equal rights. It was likewise the duty of both to exercise reasonable care to avoid collision, but it was not the duty of the defendant to exercise a higher degree of care than the plaintiff, nor was it the duty of the plaintiff to exercise a higher degree of care than the defendant. It was the duty of each, acting in his own place and under the circumstances surrounding him, to exercise that degree of care to avoid the accident which a reasonably prudent person would have exercised under the circumstances. If the defendant's negligence is the proximate cause of an injury, he is liable for damages. If the plaintiff's negligence and the defendant's negligence are equal, it cannot be said that the defendant's negligence is the proximate cause, and therefore the plaintiff is not entitled to recover. If, therefore, the plaintiff and the defendant, with equal negligence, approach each other on the highway, and injury results from the collision, there can be no recovery, because it cannot be said that the negligence of either one is the proximate cause of the injury to the other. It is manifestly true that, if neither one sees the other at all, both are equally negligent, because both are guilty of the same breach of duty to look. If, however, one sees the other, it is, of course, his duty to act with reasonable care after thus seeing the other to avoid the injury, and he cannot insist upon the other's negligence as a protection to him, if he, after discovering the other's situation, does not exercise reasonable care to prevent the ac-

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cident. The principles involved are settled by the cases of *A. T. & S. F. R. Co. v. Baker*, 21 Okl. 51, 56, 95 Pac. 433, 434, 16 L. R. A. (N. S.) 825, and *Clark v. St. L. & S. F. R. Co.*, 24 Okl. 764, 774, 108 Pac. 361, 365. In the *Baker Case*, after pointing out that the evidence showed that the engineer discovered the peril of the plaintiff, and that there was a conflict in the testimony as to whether after discovering it he used reasonable care, the court say: "This being so, it was proper to submit to the jury the question as to whether the plaintiff in error, after discovering the dangerous situation of the defendant in error, exercised reasonable care and prudence to avoid the injury." In the *Clark Case* it is said: "In the case at bar there was no evidence tending to prove that the engineer in charge of defendant's engine discovered the peril of the plaintiff until the accident occurred. The mere fact that the engineer may have seen the plaintiff approaching the track in a covered wagon would not necessarily put him on his guard as to the peril of the plaintiff. The engineer has the right to presume that a person thus approaching the track has not omitted the ordinary precautions imposed upon him by law, and will stop in time to avoid the injury. But, when the engineer sees the plaintiff approaching the track apparently unconscious of his danger or unable to extricate himself therefrom, the humanitarian doctrine requires the engineer to exercise reasonable care and prudence to avoid injuring him. In other words, he may not, without incurring civil liability, deliberately run down and kill or seriously injure a person so situated, although it may have been shown that his negligence contributed to the injury. This rule of last clear chance is recognized by the courts, as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part, and under this exception to the rule it may now be stated to be well established that the injured person, or his representative, may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the dangers of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part to avoid the injury after discovering the peril of the injured person." This rule is amply supported by the authorities from other jurisdictions. *Chunn v. City & S. Ry.*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Kirtly v. C., M. & St. P. (C. C.)* 65 Fed. 386; *St. L. & S. F. R. Co. v. Summers*, 173 Fed. 358, 97 C. C. A. 328; *G., C. & S. F. v. Bolton*, 2 Ind. T. 463, 51 S. W. 1085; *Highland Ave. & B. R. Co. v. Sampson*, 91 Ala. 560, 8 South. 778; *L. & N. R. Co. v. Richards*, 100 Ala. 365, 13 South. 944; *Little Rock R. Co. v. Cavanese*, 48

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Ark. 106, 2 S. W. 505; *St. L., I. M. & S. v. Taylor*, 64 Ark. 364, 42 S. W. 831; *Penn. Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185; *Dyerson v. U. P. R. Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, and note; *Judson v. Railroad Co.*, 63 Minn. 248, 65 N. W. 477; *Fonda v. St. Paul Ry. Co.*, 71 Minn. 438, 74 N. W. 166; 7 Am. St. Rep. 341; *Zimmerman v. Railroad Co.*, 71 Mo. 477; *U. P. R. Co. v. Mertes*, 35 Neb. 204, 52 N. W. 1099; *San Antonio Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64; 3 Elliott on Railroads (2d Ed.) § 1175. The English rule is the same. Pollock on Torts (Webb's Ed.) pp. 575-580; 1 Beven on Negligence, pp. 149-155.

In view of the error in giving this instruction, the case should be reversed and remanded to the trial court, with instructions to grant a new trial.

PER CURIAM. Adopted in whole.

MARPLE *v.* TOPEKA RY. CO.

(Supreme Court of Kansas, June 10, 1911. On Rehearing, Nov. 11, 1911.)

[118 Pac. Rep. 690.]

Street Railroads—Injuries to Pedestrian—Contributory Negligence.*—A pedestrian upon a sidewalk in a city is not as a matter of law chargeable with negligence in crossing the tracks of a street railway upon which a car is approaching, provided the car is so far away and its apparent speed is such that a person of reasonable prudence would do so in that situation.

Street Railroads—Injury to Pedestrians—Contributory Negligence.*—It cannot be held as matter of law that it is negligent to pass over a public crossing in a street where cars usually stop, in front of an approaching street car, unless its proximity, its speed as it appears to the pedestrian, the signals, if any, and other circumstances are such that no other reasonable conclusion can be drawn.

Street Railroads—Injuries to Pedestrian—Contributory Negligence.—It is held that, upon the evidence, the question of contributory negligence was properly submitted to the jury.

(Additional Syllabus by Editorial Staff.)

On Rehearing.

Street Railroads—Injuries to Pedestrian—Injuries Avoidable Notwithstanding Contributory Negligence.—Where a pedestrian killed by

*For the authorities in this series on the right to cross street railway tracks with the knowledge that a car is approaching, see foot-note of *Blake v. Rhode Island Co. (R. I.)*, 39 R. R. R. 792, 62 Am. Eng. R. Cas., N. S., 792; foot-note of *McGahey v. Citizens' Ry. Co. (Neb.)*, 39 R. R. R. 242, 62 Am. & Eng. R. Cas., N. S., 242.

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a street car was negligent, the street railway company is not liable, though the motorman might have avoided the accident after he might by ordinary care have seen that the pedestrian was in danger of being struck by the car, but is liable only in case the motorman might have avoided the accident after he actually did see the pedestrian.

(Syllabus by the Court.)

Appeal from District Court, Shawnee County.

Action by Stella B. Marple against the Topeka Railway Company. Judgment for plaintiff and defendant appeals. Reversed, and remanded for new trial.

This is an action to recover damages for the death of the plaintiff's husband caused by the alleged negligence of the defendant. Marple was walking east on the north side of Laurent street in Topeka. About the time he reached the curb on the west side of Kansas avenue an electric street car approached the crossing of Laurent street running south on the avenue. Marple continued to walk eastwardly angling slightly to the north and passing behind the car, over the west track, proceeded to the west rail of the east track, where he was struck by a northbound car on that track and thrown a distance of about 30 feet, sustaining injuries causing his death. The motorman first saw Marple about 15 feet from the car, which he reversed, but too late to avoid the injury, stopping it at a point 175 to 200 feet beyond the place of collision. The avenue is about 40 feet wide at that place from curb to curb, and the railway tracks are equidistant from the curb on either side. The rails in each track are five feet apart, and there is a space of six feet between the east rail of the west track and the west rail of the east track. At the intersection of the west line of the avenue with Laurent street the railway tracks to the southward can ordinarily be seen for one or more blocks, but Marple's view was obstructed by the south-bound car after it passed him. There was nothing to prevent him from seeing the north-bound car for one or more blocks to the south while he was crossing the space between the tracks. The accident occurred at about 6:30 a. m. The place was one of important business activity and many people appear to have been near by. There was considerable testimony that the bell, or gong was not sounded, and there was evidence that it was out of order or could not be used. The motorman testified that he could not sound it after seeing the deceased because he had to stand on both feet to manipulate the car. He testified that while his car was farther south his attention was directed to a huckster's wagon near the track, but his failure to see the deceased until close upon him or within 15 feet was not explained. Several witnesses testified that the car was going very fast. The witnesses used

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the terms "high speed," "extra high speed," "going at a high speed and jumped right into him," "an unusual high rate of speed such as to attract my attention," and "going awful fast." People who were in or about near by places of business testified that the impact sounded like striking a horse. Evidence was given that the car might have been stopped within 50 or 60 feet if running at 12 miles an hour, which is the limit allowed by a city ordinance. The jury made no special findings of the particular rate of speed. Several persons saw the deceased as he crossed the street and was injured, and testified that he appeared to be looking in front with his head slightly bowed, but no one was in a position to see, nor did any one testify that he did not glance or look to the southward, only that they did not see him look or turn his head in that direction. The motorman testified that he shouted to Marple when he saw him 15 feet from the car, but that he kept right on taking long strides. The verdict was for plaintiff. The defendant appeals.

Ferry, Doran & Magaw, for appellant.

E. D. McKeever, for appellee.

BENSON, J. (after stating the facts as above). [1] The contention of the defendant is that the plaintiff is barred from a recovery by the contributory negligence of the deceased. This claim was presented in a demurrer to the evidence, in requests for instructions, and otherwise. The argument is that if the deceased looked he must have seen the approaching car in time to have averted injury, and was negligent because he did not stop, and that if he failed to look he was equally negligent. *Young v. Railway Co.*, 57 Kan. 144, 45 Pac. 583. If it clearly appears that he was thus negligent the verdict cannot be sustained; if it does not so clearly appear, the question was for the jury. The deceased may have seen the car when he stepped over the curb, and before the south-bound car obstructed his view, but whether he did depends upon his vigilance, the distance from him to the car, and on the rate of speed with which it was running. Conceding, however, that he did at that time see, or might have seen it, he was not absolutely bound to stop there. He might properly go on to a point near the track in any event, and if there the distance and apparent rate of speed were such that a prudent person might attempt to cross he would not be chargeable with negligence in doing so. The all-important question relates to his conduct after he had passed in the rear of the south-bound car and reached the space between the tracks. There that car could not interfere with his view which was then unobstructed as the jury found. If he then saw the on-coming north-bound car, or in the exercise of ordinary care ought to have seen it, so near and apparently running with

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such speed, as to make the attempt to cross in front of it dangerous in the judgment of a person of ordinary prudence in that situation, then he was negligent, and there should be no recovery for resulting injuries. Seeing the car, however, would not as a matter of law prelude his going on his way, provided it was so far away and its apparent speed was such that a person of reasonable prudence would have proceeded as he did. "If, in view of his distance from the car, the rate of speed of its approach, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury." *Railroad Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344.

[2] Inquiry must be made then concerning the probable distance of the car from the deceased when he saw or ought to have seen it at the point where he then was near to or between the tracks. A witness for the defendant who saw the whole transaction, testified that when Marple was at the east rail of the west track the north-bound car was 50 or 60 feet from the crossing where he was killed. If the car was running within the speed limit of 12 miles an hour, and the defendant was proceeding in an ordinary walk of say 3 miles an hour, then while the car was moving 60 feet he ought to have walked 15 feet even without quickening his steps, which would have taken him across the track in safety. That he did not have time to do so indicates what the observation of witnesses, the effect of the impact, and the distance the car ran before it could be stopped, appear to prove, viz., that the car was running at a much higher speed. It must be remembered, too, that Marple from his point of view could only see the front of the car and presumably had no adequate means of estimating its speed. It is not unfair to the appellant to say that he had a right, in the absence of evidence to the contrary, to believe that the car was running within the limit of speed allowed by the ordinance. It is true that the witness who testified that the car was 50 or 60 feet away may have been mistaken, and the car may have been at a greater or less distance from the crossing. The whole situation was observed from different points by different people and it was for the jury to determine whether the car as seen by the deceased appeared to be at such a distance that, considering the speed with which he might rightfully believe it to be running, he could in the exercise of ordinary prudence make the attempt. The court cannot declare as matter of law that it is negligent to pass over a public crossing in a street where cars usually stop, in front of an approaching street car unless its proximity, its speed as it appears to the pedestrian, the signal, if any, and other circumstances, are such that no other reasonable conclusion can be drawn.

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"The mere fact that a traveler can see an approaching car, by which he is afterwards struck, does not in itself establish his contributory negligence. It must not only be approaching, but must be in such close proximity that, taking into account the reasonable rate of speed for such places and present conditions, or apparent rate of speed at which the car is traveling, a reasonably prudent man would not attempt to cross." *Saylor v. Union Traction Co.*, 40 Ind. App. 381, 387, 81 N. E. 94. 97.

"The care that is required of the pedestrian at a particular crossing can only be properly measured by taking into consideration the care he has a right to expect will be exercised by those managing a street car along the street he is about to cross. Whether he has a right to expect that the cars will be going at a slow rate of speed, that they will be under control, that they will give the proper signals of alarm to warn him of their approach—all should be considered in determining what is reasonably required of him in making such crossing." *Idem*.

The duty of a pedestrian crossing street car tracks has been stated thus: "Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision. But, as has been shown, prudence does not require one crossing the track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing." *Newark Passenger Ry. Co. v. Block*, 55 N. J. Law, 605, 614, 27 Atl. 1067, 1070 (22 L. R. A. 374).

There is nothing in the finding of the jury nor in the evidence, as we understand it, which clearly determines that Marple did not in fact observe this duty. What the distance was to the car when, as we may presume, he saw it, is left in doubt by the evidence. The rate of speed, although high, was not precisely determined. In this connection it may be useful to refer to a finding of the jury as follows: "Q. Had the deceased given attention while crossing Kansas avenue and looked for the car coming from the south, could he not have seen it in time to have stopped and avoided the injury? Ans. If the speed of the car had complied with the ordinance governing speed he could."

[3] It is only where contributory negligence is conclusively shown beyond cavil or dispute leaving no room for differences of opinion, that it is held as matter of law to bar a recovery. *Beaver v. A. T. & S. F. Rld. Co.*, 56 Kan. 514, 43 Pac. 1136. If that question is left in doubt it must be submitted to a jury. *Westine v. Railway Co.*, 84 Kan. 213, 114 Pac. 219. The judgment is affirmed. All the Justices concurring.

On Rehearing.

PER CURIAM. At the first hearing the argument related principally to the sufficiency of the evidence to support the findings

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and verdict. The specifications of errors did not assign error in the instructions. But error was specified in the order overruling a motion for a new trial, and the brief called the attention of the court to the instructions excepted to. These exceptions were, however, overlooked in the opinion, and will therefore be considered now.

[4] The instructions complained of relate to the doctrine of the last clear chance. One of them reads: "If, in attempting to make the crossing at which the injury is claimed to have been received, the deceased was not in the exercise of ordinary care, then plaintiff would not be entitled to recover, unless you believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the deceased was upon the track, or was about to cross the track, and was in danger of being struck by the car." This instruction is not in harmony with the opinion of this court in *Dyerson v. Railroad Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132. The rule upon this subject is stated in the fourth paragraph of the syllabus, and need not be repeated here. In the opinion it was said: "There seems, however, to be no sufficient reason why the mere fact that a defendant is negligent in failing to discover a plaintiff's negligence, or his danger, should in and of itself exclude all consideration of contributory negligence. Take the not unusual situation of a train being negligently operated, let us say by being run at too high a speed and without proper signal of warning being given. Now, any one injured as a result of such negligence has prima facie a right to recover. But, if his own negligence has contributed to his injury, then ordinarily his right is barred. How is the situation altered if the railroad employees add to their negligence in regard to speed and signals the negligence of failing to keep a sufficient lookout? The negligence is of the same sort; and, if the contributory negligence of the person injured prevents a recovery, when but the two elements of negligence are present, consistency requires that it should have the same effect, although a third element is added."

By the instruction given, and in two others, the jury were informed that the plaintiff might recover if the motorman by the use of ordinary care might have seen him in an exposed position of danger in time to have avoided the accident, although they should also find that the deceased was also negligent in going upon the track. This was contrary to the rule in the *Dyerson Case* and other decisions of this court. In *Railway Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150, an instruction was held to be erroneous which stated that: "If the employees in charge of the engine could by the exercise of reasonable diligence have seen the deceased on the track in sufficient time to stop the engine, and thus avoid the injury, plaintiff would be

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entitled to recover, notwithstanding the deceased was negligent in failing to see the approach of the engine." The Dyerson and Bentley Cases were followed in *Himmelwright v. Baker*, 82 Kan. 569, 109 Pac. 178. It is true, as stated in the opinion in the Dyerson Case, 74 Kan. 534, 87 Pac. 680, 7 L. R. A. (N. S.) 132, that a different principle would apply if the motorman actually saw the deceased in an exposed position of danger in time to have averted the injury, for in that case the element of recklessness or wantonness, analogous to a willful and intentional wrong, would have allowed the application of a different rule.

In the argument upon the rehearing the alleged insufficiency of the findings and evidence was again discussed, and it is insisted by appellant that the opinion is based upon a misapprehension of the facts as presented in the evidence. This may not be very important, in view of the conclusion now reached; but it is believed that the record warranted the views expressed in the opinion.

Because of error in the instructions referred to, the judgment is reversed, and the cause remanded for a new trial.

WHITE v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of Wisconsin, Oct. 24, 1911.)

[123 N. W. Rep. 148.]

Death—Right of Action—What Law Governs.—A right to be vindicated by an action in court is dependable on the law of the country where the cause of action is claimed to have arisen.

Statutes—Pleading and Proof—Law of Foreign Country.—For establishment of a cause of action dependable upon the law of a foreign county such law should be pleaded and proved the same as any other essential fact.

Evidence—Presumptions—Law of Foreign Country.—Where a violated right involving a cause of action is dependable on the law of a foreign country, and that law is not brought to the attention of the court by pleadings and evidence, the same is conclusively presumed to be like the law of the forum.

Railroads—Operation—Accidents at Crossings—Contributory Negligence—Care Required.*—Presence of a railroad track is such a significant warning of probable danger, that ordinary care requires a

*For the authorities in this series on the subject of the precautions to be taken by a highway traveler to discover whether a train is approaching before attempting to cross railroad tracks, see first foot-note of *Grand Trunk W. Ry. Co. v. Reynolds* (Ind.), 38 R. R. R. 678, 61 Am. & Eng. R. Cas., N. S., 678; first foot-note of *Heinz v. Baltimore & D. R. Co.* (Md.), 38 R. R. R. 172, 61 Am. & Eng. R.

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person before attempting to cross to first use his senses of sight and hearing, to the right and to the left, for discovery of any train which may be in dangerous proximity.

Railroads—Operation—Accidents at Crossings—Contributory Negligence—Care Required.—Failure to perform the duty to look and listen, in the circumstances stated in the foregoing, when there is opportunity therefor, is fatal want of ordinary care.

Railroads—Operation—Accidents at Crossings—Contributory Negligence—Care Required—Questions for Jury.†—The duty to look and listen, in the circumstances indicated, includes duty to see or hear an approaching train, if one is in plain sight or hearing. Hence the declaration of a person as to his having performed such duty yet did not see or hear a train, though one was in plain sight or hearing from his position, does not present a jury question, and most emphatically so as to pedestrians.

Railroads—Operation—Accidents at Crossings—Contributory Negligence—Care Required—Questions for Jury.—The rule stated as to looking, listening, seeing and hearing, is one of law, not of mere evidence.

Railroads—Operation—Accidents at Crossings—Contributory Negligence—Care Required.—Failure to comply with the aforesaid rule is not excused by mere diversion of attention or absorption in thought, or anything short of practical incapacity to give attention by looking and listening by reason of some actual prevention—physical or its equivalent.

Railroads—Operation—Accidents at Crossing—Contributory Negligence—Care Required.*—The rule stated is not open to exception to fit the varying notions of different persons as to when a train is in dangerous proximity to the crossing.

Railroads—Operation—Accidents at Crossings—Presumptions.‡—A companion rule to the foregoing is this: Where one was so cir-

Cas., N. S., 172; first head-note of *Brommer v. Pennsylvania R. Co.* (C. C. A.), 38 R. R. R. 51, 61 Am. & Eng. R. Cas., N. S., 51; second head-note of *St. Louis, etc., R. Co. v. Carr* (Ark.), 37 R. R. R. 92, 60 Am. & Eng. R. Cas., N. S., 92.

†For the authorities in this series on the subject of the effect of the testimony of one struck by a train or street car at a crossing that he used due precautions to discover whether a train or street car was approaching before he attempted to cross the track, when such testimony is contradicted by circumstantial evidence, see first foot-note of *Averbuch v. Great Northern Ry. Co.* (Wash.), 38 R. R. R. 79, 61 Am. & Eng. R. Cas., N. S., 79.

‡For the authorities in this series on the question whether there can be recovery for injuries inflicted by a train which the highway traveler should have discovered to be approached before he made the attempt to cross the tracks, see third foot-note of *Virginia-Carolina Ry. Co. v. Clawson* (Va.), 38 R. R. R. 134, 61 Am. & Eng. R. Cas., N. S., 134; last foot-note of *Heinz v. Baltimore & O. R. Co.* (Md.), 38 R. R. R. 172, 61 Am. & Eng. R. Cas., N. S., 172; fourth-foot-note of *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 37 R. R. R. 99, 60 Am. & Eng. R. Cas., N. S., 99.

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cumstanced as regards crossing a railroad track that it was incumbent upon him to use his senses to discover whether there is an approaching train in dangerous proximity, he is conclusively presumed to have been able to see or hear one if others no more favorably situated therefor did so without difficulty.

Trial—Taking Case from Jury—Questions of Law or Fact.—In case of evidence being so conclusively one way as not to support a verdict the other, the cause should be taken from the jury on motion therefor.

Trial—Taking Case from Jury—Direction to Verdict.—A refusal to direct a verdict involves judicial determination that there is such conflicting evidence and reasonable inferences therefrom that a verdict either way would not be wholly without proof to sustain it.

Appeal and Error—Review—Questions of Fact.—In case of such a judicial determination as indicated in the last foregoing, or a like determination on motion after verdict, it should not be disturbed on appeal, unless, giving due weight to the superior advantage possessed by a trial judge to reach a just result, it yet appears by the record to be clearly wrong.

Siebecker and Kerwin, JJ., dissenting.

(Syllabus by the Judge.)

Appeal from Circuit Court, Waukesha County; Martin L. Lueck, Judge.

Action by Richard J. White, as administrator of the estate of William G. Barnstable, deceased, against the Minneapolis St. Paul & Sault Ste. Marie Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to render judgment for defendant.

Action for damages claimed to have been caused to the wife of plaintiff's intestate by the alleged negligent killing of her husband while crossing defendant's track.

April 22, 1909, the deceased, William G. Barnstable, a married man 50 years of age, at Lake Villa, state of Illinois, in company with his wife, about 7:30 p. m. started to cross defendant's railway track at the intersection with a village street known as Cedar avenue. They had come from home, some little distance northeast of the crossing, and were on their way to the post office, traveling southeasterly on the sidewalk which was on the southeasterly side of the street. In their course there were three railway tracks. The first, a passing track, was about 85 feet at right angles southwesterly from the northeasterly boundary line of the right of way. At such line, in the center of the street, and about 116 feet on a line to the point where the sidewalk on which Barnstable and his wife were walking reached the passing track, there was suspended about 15 feet above the surface of the street, a gasoline arc light of a rated 1,000 candle power. There were no obstructions interfering with the il-

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lumination from this light reaching the passing track at such crossing, a considerable distance up and down and across the track, and across the second or main track, located about 14 feet further southwesterly. Along the southwesterly side of the latter and southeasterly of the southerly sidewalk was a station platform and depot. The platform reached to within about 15 feet of the sidewalk and the depot to within about 135 feet. The third track was some 50 feet southwesterly of the main track and within 10 feet of the southwesterly side of the depot. On the north end of the station platform, within 8 or 10 feet of the sidewalk and some 50 feet from the point where the sidewalk intersected the passing track there was a lamp similar to the one before mentioned. Both lamps were in service at the time of the accident. There was a freight train on the main track going south, which intercepted, to some extent, light from the lamp on the depot platform reaching the sidewalk crossing of the passing track. Aside from such interference there was nothing to prevent the two lights from illuminating such crossing and the surrounding territory, reaching out from it in all directions for a considerable distance.

As Mr. Barnstable and his wife reached the right of way, a Mr. Rogers was in the act of lighting the lamp located there. The two conversed for a moment while Mrs. Barnstable walked on. It was cloudy and pretty dark, but the lights rendered all objects on the northerly side of the main track for a considerable distance up and down the same discernible. Mr. Barnstable was perfectly familiar with the operation of trains on the track and all the surroundings. He was delayed at crossing by the freight train. During the delay, after talking as stated with Mr. Rogers he walked to and fro on the sidewalk northeasterly of the passing track while his wife was seated on a cedar post near the walk, a short distance from such track. At this time Mr. Rogers was seated in his conveyance near by, waiting for the train to pass. It was about 20 minutes to 8 p. m. A Mr. Wunder during this waiting period drove up with a bus and stopped with the others for the freight train to clear the crossing. Both Wunder and Rogers were a little further from the crossing of the sidewalk over the passing track than Barnstable and his wife. While all were as indicated, Mr. Barnstable moved southwesterly till he entered or nearly entered upon the passing track and then stopped again, waiting for the freight train to clear. He stood looking at it with his line of sight to the right and his back rather towards the left-hand side of the walk. The moving train was making so much noise as to drown that of cars moving from the left on the passing track towards where Mr. Barnstable was standing. A train from the right came in just ahead of the one which was obstructing the crossing of the main track. Part of the former had been left on the passing

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track to the right while the engine, four box cars and two gondola cars, loaded with sand passed by the station to the left. One of the gondola cars was set out and the engine and other cars were then backed toward the crossing at a speed of about five miles per hour. The gondola car was farthest from the engine and the first to reach the crossing. There was no light on it or any trainman thereon nor any signalling. Just before the gondola reached the sidewalk Mr. Barnstable started to make the crossing of the passing track, as he observed the freight train was about to clear it. At that instant he was 20 to 25 feet nearer the gondola car than Mr. Rogers or Mr. Wunder. They both saw the car in ample time for Barnstable to have avoided it had he also seen it and made an effort to do so. Rogers saw the car when it was about 12 feet from the crossing. Mr. Barnstable was then in motion. Rogers, seeing his danger, called him. He turned his head to the left and in an instant, as he was about over or on the southerly side of the westerly rail, was struck and killed. Rogers testified that Barnstable looked both ways before he started to cross; that when he was on the passing track he could have seen the car at the time he—Rogers—did had he looked. Wunder saw the car coming when it was some 50 feet from the crossing. From his viewpoint Barnstable stood looking rather to the right at the train passing on the main track, than in the direction of the approaching car. Parties waiting to make the crossing expected the train on the passing track would have to be made up and moved out.

The testimony on the part of defendant indicated that any one, circumstanced as Barnstable was, could have seen the cars backing up toward the crossing while they were some considerable distance away by looking in that direction for the purpose of observing whether such danger existed; that there were no obstructions interfering with the light from the lamp north on the easterly side of the right of way rendering cars on the track left of the sidewalk visible for a hundred or more feet away.

The issue made by the pleadings as to whether plaintiff's intestate was negligently run down by defendant's train and killed without contributory negligence on his part, and all other issues essential to a cause of action under the laws of the state of Illinois, were submitted to the jury and found in plaintiff's favor. Judgment was rendered accordingly.

There was a motion on behalf of defendant for a directed verdict; a motion, after verdict, to modify it, among other things, by finding that deceased was guilty of want of ordinary care proximately contributing to his death; for judgment on the verdict as so modified, and a motion to set aside the verdict as contrary to the evidence and for a new trial. Exceptions were duly saved to adverse rulings on such motions.

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W. A. Hayes and Ryan, Merton, Newbury & Jacobson (John L. Erdall, of counsel), for appellant.

Gill, Barry & Mahoney, for respondent.

MARSHALL, J. (after stating the facts as above). [1-3] The claimed cause of action arose in the state of Illinois and so is governed by Illinois law. However, in the state of the record such law—the same not having been formally brought to the attention of the trial court by pleading and evidence—must be presumed to be like that of this state. *MacCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707; *Edleman v. Edleman*, 125 Wis. 270, 104 N. W. 56. But, we may say in passing, if the Illinois law, for the case did not rest in presumption, it would be found quite as strict as that here as regards the quantum of care required of a person in attempting to travel across a railway track at a highway crossing, to come up to the standard denominated, ordinary care, and render efficient in respect to liability in circumstances similar to those here, for failure of the railway company to exercise ordinary care not to injure such person.

There are a few principles which—though they may well be considered so elementary as not to require even to be stated, much less to be dignified by reference to adjudications showing they were firmly entrenched in our jurisprudence at the time of the accident in question—we will refer with particularity on account of the seriousness of the case.

It is well, in administering the law, to restate, from time to time, old but living, vital principles however familiar they may be. That tends to prevent deviation therefrom, now and then, as one comes to face situations of great hardship to one party or the other, because of their irremediable character without warping some settled rule supposed to be essential to successful attack or defense. It tends to preserve the law as a science instead of allowing it to fall into confusion and drift to the level of mere arbitration.

[4] Presence of a railroad track is such an admonishment of probable danger that it is inconsistent with ordinary care for a person—traveling on an intersecting highway across such track—to attempt to cross the track without first using his senses of hearing and seeing, to the right and to the left—mindful of the probability that a train or car may dangerously invade the crossing at any time, so as to discover any such danger, before passing into or remaining within the zone thereof. *Haetsch v. C. & N. W. R. Co.*, 87 Wis. 304, 58 N. W. 393; *Schlimgen v. C. & N. W. R. Co.*, 90 Wis. 186, 62 N. W. 1045; *Nolan v. M. L. S. & W. R. Co.*, 91 Wis. 16, 64 N. W. 319.

[5] The duty to look and listen for an approaching train before attempting to cross a railroad track is absolute. Failure to do so when there is opportunity therefor and to keep out of the path of an approaching train or car, which would come under

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one's observation by vigilant performance of such duty, is want of ordinary care as a matter of law. *White v. C. & N. W. R. Co.*, 102 Wis. 489, 78 N. W. 585; *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889; *Steber v. Ry. Co.*, 115 Wis. 200, 91 N. W. 654; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542.

[6] This absolute duty of a person to look and listen before attempting to cross a railway track, extends to vigilant attention in all directions from which a train, locomotive or car may come, and includes obligation to see and hear such, if there be any, which such attention, in view of the danger, will enable him to. Therefore, for a person to declare he performed such duty and yet failed to perceive an approaching train or car, in case of there being such in plain sight or hearing, does not raise a question of fact for decision by a jury. Such person must be presumed to either not have performed such duty or to have done so and yet heedlessly submitted himself to the danger, and that is particularly so as regards a person traveling on foot "since the danger zone in such a case is so narrow and it may be avoided with so little effort." *White v. C. & N. W. R. Co.*, supra; *Cawley v. La Crosse City Ry. Co.*, 101 Wis. 145, 77 N. W. 179; *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889; *Stafford v. Chippewa Valley E. R. Co.*, 110 Wis. 331, 85 N. W. 1036; *Schroeder v. Wisconsin Cent. R. Co.*, 117 Wis. 33, 93 N. W. 837.

[7] This rule of look and listen, in the circumstances stated, and to observe the dangers which are in plain sight or hearing to one in the vigilant performance of it, is, as before indicated, a rule of law, not a mere rule of evidence. *Cawley v. La Crosse City R. Co.*, 101 Wis. 145, 77 N. W. 179; *Koester v. C. & N. W. R. Co.*, 106 Wis. 460, 82 N. W. 295; *Marshall v. Green Bay & W. Co.*, 125 Wis. 96, 103 N. W. 249.

[8] An important companion rule to the foregoing is this: The danger to a person is so great in attempting to cross a railroad track without performing the duty of endeavoring to discover any approaching car or train which is in plain sight or hearing, by the vigilant use of his senses, and at the last opportunity for doing so before entering the zone of probable peril, that no mere diversion of attention or absorption in thought about other matters will excuse nonperformance of it. *C. & N. W. v. Weeks*, 99 Ill. App. 518; *Guhl v. Whitcomb*, supra; *Hain v. C., M. & St. P. R. Co.*, 135 Wis. 303, 116 N. W. 20; *Smith v. C., M. & St. P. Ry. Co.*, 137 Wis. 97, 118 N. W. 638; *Clemons v. C., St. P., M. & O. Ry. Co.*, 137 Wis. 387, 119 N. W. 102.

Where there is opportunity to perform this duty to look and listen, no diversion of attention short of prevention of some sort will excuse nonperformance. Not, necessarily, physical prevention by the attention being actually physically forced away, though that term has been used, but something akin to it, the term

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irresistibly being used and applied where a person was prevented from looking by reason of violent efforts to manage a team which had escaped, or was escaping from his control. In this respect *Piper v. Railway Co.*, 77 Wis. 247, 46 N. W. 165, has been explained and modified. *Schneider v. C., M. & St. P. Ry. Co.*, 99 Wis. 378, 386, 75 N. W. 169; *Koester v. C. & N. W. R. Co.*, 106 Wis. 460, 469, 82 N. W. 295; *Clemons v. C., St. P., M. & O. Ry. Co.*, 137 Wis. 387, 119 N. W. 102; *Marshall v. G. B. & W. R. Co.*, 125 Wis. 96, 103 N. W. 249; *Sarles v. Railway Co.*, 138 Wis. 498, 120 N. W. 232, 21 L. R. A. (N. S.) 415.

[9] The rule discussed does not admit of any exception, especially as regards tracks in a railroad yard, to fit the variant notions of travelers as to whether a car or train is in dangerous proximity, since the track is to be regarded as notice that one is liable to pass in either direction at any time. So before stepping upon the track one must look and listen for a coming train, if there is opportunity to do so, and proceed when informed by his senses that there is none dangerously near. *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

The court refused to follow *Ward v. Railway Co.*, 85 Wis. 601, 55 N. W. 771, very soon after it was written, holding that a railroad track is such a striking admonition of danger—a proclamation of probable momentary peril—that one must properly perform the acts of looking and listening, or bear the consequences of his want of care in the matter, or of such want of care and like fault of the railway company concurring. *McKinney v. C. & N. W. R. Co.*, 87 Wis. 282, 284, 58 N. W. 386. In fact, the rule discussed excludes the idea that one can step upon a railway track, under any legitimate inference that it is safe to do so, without first performing the duty to look and listen and see and hear those things which one so circumstanced might well see and hear by vigilant effort to that end. *Schilmgen v. C., M. & St. P. Ry. Co.*, 90 Wis. 186, 193, 62 N. W. 1045; *Nolan v. M. L. S. & W. R. Co.*, 91 Wis. 16, 26, 64 N. W. 319. Even such a persuasive circumstance as gates being raised where such exist and are customarily let down to bar the way to the track when a train is about to pass, has been held not to excuse a traveler on foot from using efficiently, his own faculties to discern whether the track is clear before entering upon it. *White v. Railway Co.*, 102 Wis. 489, 78 N. W. 585; *Walters v. Railway Co.*, 104 Wis. 251, 80 N. W. 451. Emphasizing this, the Illinois court remarked that, not only must the duty to look and listen before entering upon a railroad track be performed but it must be performed attentively with intention to discover imminence of danger if it exists, and that it must be presumed one so circumstanced could have seen or heard, had he looked or listened, that which was in plain sight or hearing, and which others no better situated in respect to the matter, saw or heard. *Wabash R. Co. v. Simillie* 97 Ill. App. 7.

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The stated principles have become so firmly established in the unwritten law—as will be observed by the many illustrative cases cited, to which many more might be added—that they are not open to question except so far as varied by statute. Hence we may well rest them for the case without elaboration, discussion or quotations from precedents. The principles are not matters of mere remedy or procedure and so open to change retroactively. They appertain to the right itself. They must be satisfied, in a situation as here, in favor of the plaintiff or there is no established cause of action. So the law existing at the time of the happening of an injury, determines the right. That cannot be added to or taken from by legislation. *Clemons v. C., St. P., M. & O. Ry. Co.*, 137 Wis. 387, 400, 119 N. W. 102; *Keeley v. Great Northern Ry. Co.*, 139 Wis. 448, 454, 121 N. W. 167; *Quinn v. C., M. & St. P. R. Co.*, 141 Wis. 497, 498, 124 N. W. 653.

The alleged cause of action here, we must observe, in connection with what has been said, happened prior to the passage of chapter 332, Laws of 1909, and chapter 653, Laws of 1911, changing somewhat the essentials of a right, in certain circumstances, appertaining to injuries to travelers on highway crossings of railway tracks. As regards any accident since the enactment of the statutes and within their purview, the rules stated here must yield to the written law.

Now, it would seem that a mere reading of the statement of facts in this case, in connection with the legal principles mentioned, can lead to but one conclusion. The locus in quo was in a railroad yard and the particular track was designed for yard use. So the rule applies with superlative significance that the deceased should have apprehended that a train might approach the crossing from either direction at any time, regardless of anything which had occurred, indicated by the evidence. The previous occurrences should rather have put him on the alert than otherwise.

If the deceased was diverted from paying attention in the direction from which the car was approaching, by his being intent upon observing when the south bound train cleared the crossing so he could proceed, and that was what caused his failure to observe the danger or his being absorbed in the thought of reaching the post office before closing time, caused the difficulty, neither excuses him for failure to discover the danger, if it was in plain sight, as we have seen. If he failed to look to the south before entering upon the track, then he was fatally at fault. As it is understood here, counsel for appellant make no claim contrary to these observations. They predicate their case on the theory that the deceased did look in the direction of the coming car before stepping upon the track, but did not see it and could not do so because of darkness, and that he could not hear the car because of noise made by the passing train.

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That he could not hear the approaching car may be readily conceded. Certainly the jury were warranted in so finding. But were they warranted in finding that deceased seasonably performed the duty to look, and was unable to see the car because of darkness?

[10] The proximity of the 1,000 candle power light which was only a little over 100 feet away and entire absence of interferences and the whole physical situation, show with mathematical certainty that there was ample opportunity for deceased to seasonably have seen the car before he entered upon the track. So the rule applies that he was bound to see it, and avoid it or not at his peril. That is reinforced by the undisputed fact that several witnesses, including his wife, saw the approaching car, rendering applicable the rule stated, that the particular person must be conclusively presumed to have seen the car if he looked in the direction thereof, since it was plainly visible to others no more favorably situated therefor than he was. Under the circumstances, had he survived and testified on the trial that he looked southerly on the track before stepping upon it and could not see the car approaching, his evidence would not have been entitled to credence.

[11-13] So, when we examine the case from all viewpoints, we are constrained to conclude that it has not a peg, so to speak, to stand on as to the question of whether, at the close of the evidence it presented a jury question. The court, it seems, should have taken the case from the jury on the motion made in defendant's behalf for a directed verdict. The failure to do that, in effect, judicially informed the jury that there was room in the evidence for conflicting reasonable inferences on the question of contributory negligence. It is not strange, under such circumstances, that they resolved the doubt in favor of plaintiff. There is the danger of practically putting upon the jury the burden of deciding the judicial question—to deal with a case as involving controverted matters of fact, vital to the ultimate result, when the evidence plainly will not support a finding other than one way. The error here was primarily an error of law attributable to the court. The jury may well be excused for deciding that the weight of probabilities is one way when it seems to the judicial mind to be the other way, where there is room for weighing probabilities against probabilities, or even where there is not, if the attitude of the court is to the contrary. True, whether there is such room or not, is often a very serious question, and in such a situation it is quite proper, in the trial jurisdiction, to lean toward resolving the doubt in the affirmative. In recognition of that and the better facilities the trial court has for solving such a question. The rule has become firmly established that its disposition of such a matter will not be disturbed here unless, upon the record, after giving due heed to the more favorable oppor-

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tunity below for reaching a right result, it appears, to be clearly wrong—manifestly wrong, as has sometimes been said to indicate, emphatically, the dignity to be given to a trial court's decision. It is considered that such rule is well satisfied in this case in favor of the appellant.

It follows from what has been said that the trial court erred in not taking the case from the jury and in failing to cure that mistake by changing answers in the special verdict, in response to appellant's motion, so as to find the deceased to have been guilty of fatal contributory negligence. That element precluded a recovery notwithstanding the finding on ample evidence that that appellant was negligent in backing the car upon the crossing as it did.

The judgment is reversed, and the cause remanded with directions to render judgment in favor of the defendant.

Siebecker and Kerwin, J. J., dissent.

CHICAGO, M. & ST. P. RY. CO. v. CITY OF MINNEAPOLIS.

(Supreme Court of Minnesota, Oct. 27, 1911.)

[135 N. W. Rep. 169.]

Railroads—Crossings—Regulations.*—The rule that a railway company may be required to erect and maintain a bridge to carry its tracks over a street crossing extends to all cases where the public safety, convenience, or welfare require such bridge.

Canals—Establishment by Public.—A waterway, with walks on each side, duly established by public authority for public use, connecting navigable lakes and public grounds, as to the principles applicable thereto, is not distinguishable, either by the fact that it is artificial or by the fact that it is in part a waterway, from a natural waterway or from a landway.

Eminent Domain—Railroad Crossings—Damages.—The rule applicable to crossings of streets and railroads applies to the crossing of a public canal and a railroad, and in proceeding to condemn a right of way for a public canal across a railway right of way, through an embankment, the company is not entitled to be awarded, as damages, the necessary expense of building a bridge to carry its tracks over the canal.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; W. E. Hale, Judge.

*See second foot-note of New York, etc., R. Co. v. Rhodes (Ind.), 31 R. R. R. 569, 31 Am. & Eng. R. Cas., N. S., 569.

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Condemnation proceedings by the City of Minneapolis against the Chicago, Milwaukee & St. Paul Railway Company. From the judgment, the railway company appeals. Affirmed.

F. W. Root, for appellant.

C. J. Rockwood and *Daniel Fish*, City Atty., for respondent.

SIMPSON, J. This is an appeal from a judgment of the district court of the county of Hennepin in a controversy submitted on an agreed statement of facts, pursuant to section 4286, R. L. 1905. The stated facts are substantially as follows:

Within the corporate limits of the city of Minneapolis, the respondent herein, are three meandered lakes—Lake Calhoun, having an area of 460 acres; Lake of the Isles, having an area of 107 acres; and Cedar Lake, having an area of 150 acres. Each of these lakes is adopted for use by the public for pleasure boating, ice boating, skating, and other like uses, and is actually used by the public for such purposes. The city of Minneapolis has acquired, for park and parkway purposes, all the lands constituting the shores of Lake Calhoun and Lake of the Isles, as well as a portion of the shores of Cedar Lake, also large tracts of land located near to said lakes, and such lands are used for park and parkway purposes. The city of Minneapolis has determined to construct, and is now constructing, two canals for public use, one connecting Cedar Lake with the Lake of the Isles, and one connecting the Lake of the Isles with Lake Calhoun. The construction of such canals will greatly enhance the usefulness of said lakes to the public for pleasure boating, ice boating, skating, and like purposes. Lake Calhoun and Lake of the Isles are separated by a narrow strip of land of varying width, at its narrowest point some 600 feet wide. The natural surface of this strip of land where the canal is being constructed is about 2 feet above the level at which the waters are maintained in Lake of the Isles and Lake Calhoun. There is between these two lakes a small natural water course in which water flows from Lake of the Isles to Lake Calhoun.

The appellant railway company is the owner of a right of way, a strip of land 100 feet in width, extending lengthwise along and near the center of the land between Lake Calhoun and Lake of the Isles. Along this right of way the appellant, long before any steps were taken by the respondent city to construct the proposed improvement, had constructed an embankment, which, at the point where the canal will intersect it, is about 16 feet in height above the surface of the ground, and about 18 feet in height above the established surface level of the water in the lakes and in the proposed canal. Upon the surface of this embankment the company laid its rails, and has operated and still operates a commercial railway over and along its said right of way.

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To enable it to construct the proposed improvement, consisting of a waterway or canal, with walks upon either side thereof, the city seeks to condemn and take an easement in a strip of land 100 feet wide, extending across the right of way of the appellant. The taking of this land is for a public purpose, and the city's right to so acquire this strip is conceded by the appellant railway company for the purposes of this appeal. The location of the proposed canal at the point where it crosses the railway tracks is immediately west of the natural water course between Lake Calhoun and Lake of the Isles; the center line of the proposed canal being 59 feet west of the point where the waters flowing in such natural course are carried through the embankment of the railway company in a pipe about 3 feet in diameter. The canal, when constructed, will take the place of, and permit the closing of, this natural channel.

The construction and maintenance of the waterway and walks through the embankment of the railway company will necessitate the construction of a bridge to carry the railway tracks over the same. The agreed value of the strip of land 100 feet wide taken from the appellant for the public way is \$10, and the cost of the construction of an adequate bridge over the canal and walks is \$15,969. To such cost of the bridge is added, for purely ornamental features contained in the plans adopted by the parties hereto, the sum of \$2,544. This added cost for ornamental features is assumed by the city. By further agreement of the parties, the city is authorized to take the land involved and construct the proposed improvement. The railway company is to contract the bridge as planned, waiving no claim, however, for damages or compensation to which it is entitled under the law by virtue of such taking as in condemnation proceedings, and the city is obliged to pay all such damages and compensation. Upon trial of the matters so submitted, the court, upon the admitted facts, assessed the appellant's compensation for the taking and damaging of its property for the construction and operation of the public way in the sum of \$2,554, being \$10, the value of the land taken, and \$2,554, the cost of the ornamental features of the bridge, and disallowed the railway company's claim for the cost of constructing an adequate bridge.

[1] By its appeal the railway company presents for consideration and decision the question whether it is entitled to have included, in the assessment of its damages for the taking and injuring of its property for a public use, the cost of constructing a sufficient bridge made necessary by such use. The contention of the appellant is that the taking of its property for this public use, without making compensation, including not only the value of the land taken, but as well the resulting expense of the construction and maintenance of a bridge, will be a taking, de-

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struction, and damaging of private property for public use without just compensation, in violation of section 13, art. 1, Const. of Minn., and will constitute as well a violation of the fourteenth amendment to the Constitution of the United States. This contention is based on the claim that the bridge is made necessary solely through the exercise of the right of eminent domain by the city, and that—because no question of safety of the crossing of the railway tracks and the public way is involved—the railway company cannot be required, by an exercise of the police power, to bear the uncompensated burden of building the bridge.

[2] In considering the question thus presented there is no difficulty in determining the nature of the way here involved, established by the city between the lakes and between the surrounding parks and parkways. Such nature clearly appears from the stated facts. Lake Calhoun and Lake of the Isles are public navigable waters, and the proposed waterway connecting them will, when established, be a public navigable waterway. Such connecting waterway will enhance the usefulness of the lakes in affording opportunity to the public for recreation and pleasure. Such waterway will thereby directly tend to promote the health, happiness, and welfare of the public. When this waterway is established, the fact that it is artificial does not distinguish it, as to the law applicable thereto, from a natural water course. Nor does it differ in nature and applicable rules from a landway. The landway, like this waterway, is artificial, laid out and established to meet the public need and promote the general welfare.

The proposed way has on each side walks, and the bridge in question in part is necessary to permit the establishment and use of these walks crossing under the tracks. By the concession of the right of the city to condemn the railway's property for this use, the reasonable necessity and convenience to the public of these footways, as well as of the waterway, is admitted for the purpose of this appeal.

Nor does the fact that the waterway and walks will be used in connection with the lakes and parkway for pleasure and recreation distinguish, as to the legal principles applicable, this way from a road or canal devoted to the movement of goods or other commercial purposes. The desirability of conserving, extending, and maintaining reasonable opportunities for wholesome public recreation is continually gaining in general recognition, because such opportunities and the use thereof concededly tend to promote the general health and welfare of the people. This court has said, speaking of inland lakes: "We are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule." *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541. The same

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view is expressed by another court in the statement: "Its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose." *Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276.

The way sought to be established—a canal or waterway, with walks along each side—being clearly a public way, subject to the rules governing public ways, we are concerned with the nature of the property rights and duties of the railway company involved in crossings of railroads and public ways. The general principle applicable to such crossings has been determined and announced in this state and applied to one kind of crossing. The same general principle has been applied in other jurisdictions to other crossings, until the law relating to establishing and maintaining public ways and improvements across railway tracks, including the incidental questions of the resulting duty of the railway company and just compensation for its property taken or injured, seems clearly settled. The general rule so established is that, where the safety, convenience, or welfare of the public require that a railway company carry its tracks over a public way or the public way over its tracks by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved or police power of the state. A railroad, though constructed first in time, is constructed subject to the implied right of the state to lay out and open new highways crossing its right of way. If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience, or welfare in the exercise of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable readjustment of its tracks as will permit the exercise of the superior public right. In *State ex rel. v. St. P., M. & M. Ry. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, and *State ex rel. v. N. P. Ry. Co.*, 98 Minn. 429, 108 N. W. 269, this court announced these general principles and applied them to crossings of city streets and tracks of railway companies, and held that where railway tracks cross a city street the uncompensated burden of constructing and maintaining a bridge to carry its tracks over the street, or to carry the street over its tracks, is upon the railway company, if such bridge is necessary to make such crossing reasonably safe for use by the public; and this, though the railway company acquired its property and operated its road over the place involved before the street was established.

[3] Counsel of the appellant railway company contends that the instant case on its particular facts should be distinguished

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from the above cases, because in this case of a waterway crossing railway tracks a grade crossing is impossible, the dangers incident to a grade crossing do not arise, and hence the uncompensated burden of building a bridge cannot be placed upon the railway company under the police powers of the state. We think this contention could be sustained only by placing an unreasonable limitation on the doctrine announced in the crossing cases, and by considering as controlling superficial facts about the proposed way rather than its conceded nature. The opinion in *State ex rel. v. St. P., M. & M. Ry. Co.*, *supra*, discusses and affirms the right of the state in the exercise of the police power to require safety devices or bridges at crossings, so that the public using the street will not be subjected to danger. The danger in grade crossings was the particular thing in that case calling for an exercise of the police power. But it was not the announcement of the safety device rule that made this case a leading and important one in this state. The safety device rule had been announced in earlier decisions. The important rule announced in the later case is: "A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed." And further that: "Cases where one railroad crosses another have no application, because both stand on an equality respecting rights and obligations, while in cases like that at bar the rights of the public are superior."

The doctrine thus announced does not limit the power of the state to require railways to adapt their tracks to the use by the public of highways to cases where the use of the highways as laid out and used involves danger to the public. The police power of the state is concerned with the convenience and welfare of the public, as well as its safety. Nor on principle could the general doctrine so announced be limited to streets and highways, as distinguished from other necessary public improvements crossing the company's right of way. In *State ex rel. v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121, a distinction is made between necessary planking and safety devices at street crossings. Such distinction, as was pointed out in *State ex rel. v. St. P., M. & M. Ry. Co.*, above, is not recognized by the authorities sustaining and applying the broad rule an-

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nounced in the later Minnesota case. These authorities do not limit the application of the rule to the requirement of safety devices.

In *C. & I. W. Ry. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503, the court passed upon the question of the compensation to which the railway company was entitled in condemnation proceedings instituted by the city to open a street across the railroad right of way. The tracks of the railway company were on an embankment 15 feet above the natural surface of the ground. The proposed street extended across the right of way below the tracks through this embankment, thus making necessary a bridge to carry the tracks over the street. No compensation was allowed to cover the cost of the erection and maintenance of this bridge. It is apparent that in the Indiana case the dangers of a grade crossing were in no way involved. The only street proposed passed under the railway tracks. In denying the claim of the railway company for such compensation, it is stated: "Appellant's counsel overlook the fact that there are two distinct principles of law that operate upon the question we have under consideration, namely, 'eminent domain,' which implies a taking by the sovereign for some public benefit, and the 'police power,' which implies a regulation by the sovereign of private property for the preservation of the public safety, health, and general welfare."

This case being taken to the United States Supreme Court, the decision of the state court was affirmed in this language: "The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court. * * * The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.'" *C., I. & W. Ry. Co. v. City of Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060.

Under this rule as applied in the Indiana case—and this is clearly the same rule as that announced in this state in *State ex rel. v. St. P., M. & M. Ry. Co.*, *supra*—if the city of Minneapolis

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were opening a street under the tracks and through the embankment of the appellant railway company, the company would not be entitled to compensation for the necessary bridge. It is clear that no distinction in law exists between such supposed improvement and the one actually proposed to be made. Each is a public way opened below the tracks through the embankment of the railway company, making necessary a bridge to support the tracks. It would be no more possible for the railway company to reconstruct its railway across such a street without a bridge than it is to carry its railway over the proposed canal without a bridge. No property right of the railway company can be interfered with by the removal of its supporting embankment for a waterway that is not interfered with to the same extent by the removal of the embankment for a landway. Even the superficial facts concerning the two ways differ little. The proposed way here involved has two walks under the tracks through the embankment, the reasonable necessity of which is conceded. These walks make necessary a bridge. The fact that the public has determined that it will be better served by a portion of the way being water instead of land cannot, on any legal principle, shift the burden of a required bridge from the railway company to the public. The railway company is not vested with a property right that can discriminate between public travel passing under its tracks on wheels and in boats. The superficial differences could be further lessened by assuming that a driveway had been laid out along the canal crossing the right of way, or that a waterway was extended to each side of the right of way with a portage beneath the tracks.

Nor is the general rule requiring railway companies to adjust their tracks to public improvements when the public convenience or welfare requires limited in its application to traveled ways. In *C., B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, was involved the question of the right to compel a railway company to enlarge a bridge, without compensation, to permit the passage down a natural waterway or waters collected by a system of drainage. The railway company had for years, at a point where its tracks cross a creek, maintained a suitable culvert sufficient to allow the passage of the waters naturally flowing in the creek. Drainage commissioners, having determined to drain a large district into and through the creek in order to reclaim and make tillable wet lands, notified the railway company to enlarge and widen the culvert through its right of way. The company refused to comply with this requirement unless compensated for the expense incurred. The court, in holding that the company might be required to construct the abutments and bridge, without compensation, stated: "The learned counsel for the railway company seem to think that the adjudications relat-

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ing to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community, apart from any question of the public health, the public morals, or the public safety. Hence he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. * * * If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case."

In *C. & E. Ry. Co. v. Luddington* (Ind.) 91 N. E. 939, it is held that the rule applicable to highways is also applicable to public ditches established across the right of way of a railway company, and that compensation need not be made to the railway company to cover the cost of a bridge made necessary to carry its tracks over the ditch. In *C., B. & Q. R. Co. v. Board of Supervisor* (8th Circuit) 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117, it is held: "In proceedings to condemn right of way for a public drainage ditch across a railroad the company is not entitled to be awarded as damages the expense of building a new bridge over the ditch, but its damages are confined to the value of the easement across its right of way, regardless of whether or not the ditch follows a natural water course over its right of way."

In *W. C. Street Ry. Co. v. People*, 214 Ill. 9, 73 N. E. 393, Id., 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845, and in *Union Bridge v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, the duty of a railway company to adapt, without compensation, its tracks to changes made in navigable streams is affirmed. In the latter case this language is adopted: "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public."

In *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831, another application was made of the same general rule. A gas company had laid its pipes

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in the streets of the city, under a franchise, at the place indicated by the public authorities. Afterwards the city established a drainage system, the construction of which required a change in the location of the gas pipes. It was held that the company property was not taken or injured by the requirement of such change for the reason assigned, among others: "When it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made. * * * In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

It appears from these cases—and many other similar cases might be referred to—that the principle announced by this court in *State ex rel. v. St. P., M. & M. Ry. Co.*, *supra*, while there applied to the requirement of a safety device at a street and railway crossing, is not limited either to the requirement of safety devices or to crossings of streets and railway tracks, but is broadly applicable to public improvements crossing the railway tracks whenever, to permit such crossing, the convenience or welfare, as well as the health or safety, of the public require a reasonable readjustment by the company of the means for supporting its tracks. Under modern conditions railway companies are pioneers in development. Railroads are constructed usually in advance of the public ways and improvements made necessary by subsequent settlements. The railroad is thus first constructed making provision for existing land and waterways, but without reference to subsequent improvements. By such construction natural conditions are changed. Solid embankments may be erected across low lands, or deep cuts made through higher lands. But it is now clearly established in this state, as in most states, that the company so builds its road subject to the reserved right of the public to lay out highways, locate drains, or establish or improve waterways across the company's right of way when the necessity therefor arises. For the property taken in making such improvements compensation must be made, but for the incidental expense in making reasonable changes in the method of carrying its tracks over such improvements, when public safety, health, convenience, or welfare require such change, no compensation can be claimed by the railway. Such change is required under the reserved or police power of the state.

In the instant case the railway company constructed and placed its rails on a 16-foot embankment along a strip of land 600 feet wide separating two navigable lakes, confining a natural water course between the lakes in a pipe through such embankment. The company, by such construction, did not acquire such a property right in maintaining its tracks on the embankment that it is entitled to compensation for the cost of a necessary bridge to

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carry its tracks over a public way thereafter duly established across its right of way. The public right to lay out such way though asserted subsequent in time to the construction of the road, is so far the prior and superior right that the company is required to make such reasonable readjustment of its tracks as is necessary to permit of the safe and convenient use of the public way. The requirement of such readjustment is not a taking or injuring of property, but rests on the exercise of the reserved or police power of the state. The proposed way is made up of a waterway and walks on each side. The waterway takes the place of the existing natural water course, and becomes, like the lakes it connects, public navigable water. A bridge to carry the railway tracks over this way is a necessary incident of its use by the public, and is required by public convenience and welfare. These facts clearly bring the instant case within the general principle announced in *State ex rel. v. St. P., M. & M. Ry. Co.*, supra, and within the applications of that principle as repeatedly made by the authorities in the federal and state courts.

It follows that the trial court properly refused to include in the compensation allowed the railway company the item of the cost of a bridge—exclusive of ornamental features—required to carry the tracks of the railway company over the newly established public way.

Judgment affirmed.

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(Supreme Court of North Carolina, Nov. 1, 1911.)

[77 S. E. Rep. 488.]

Railroads—Fires—Presumptions and Burden of Proof.*—Where property is destroyed by fire started by a railroad engine, after plaintiff has introduced evidence from which presumption of negligence

*For the authorities in this series on the question whether a presumption of negligence on the part of the railroad arises from the fact that a fire originated from sparks from its locomotive, see first foot-note of *Birt v. Southern Ry. Co.* (S. Car.), 38 R. R. R. 687, 61 Am. & Eng. R. Cas., N. S., 687; *Carter v. Maryland & P. R. Co.* (Md.), 38 R. R. R. 142, 61 Am. & Eng. R. Cas., N. S., 142.

For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a fire is set by a locomotive, see last paragraph of foot-note of *Birt v. Southern Ry. Co.* (S. Car.), 38 R. R. R. 687, 61 Am. & Eng. R. Cas., N. S., 687; *Westing v. Chicago, B. & Q. R. Co.* (Neb.), 38 R. R. R. 688, 61 Am. & Eng. R. Cas., N. S., 688; *Carter v. Maryland & P. R. Co.* (Md.), 38 R. R. R. 142, 61 Am. & Eng. R. Cas., N. S., 142; foot-note of *Deppe v. Atlantic C. L. R. Co.* (N. Car.), 37 R. R. R. 39, 60 Am. & Eng. R. Cas., N. S., 39.

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arises, the burden of satisfying the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated, is upon the defendant.

Railroads—Fires—Question for Jury—Presumption of Negligence—Rebuttal.—Where the presumption of negligence arising from the fact that a fire was started by a railroad is one of fact, and defendant gives evidence in rebuttal which if believed would establish the fact that the engine was properly equipped, and was in charge of competent employees, and was prudently operated, this evidence is not contradicted, and it is for the jury to pass upon its weight.

Railroads—Fires—Actions—Sufficiency of Evidence—Defects in and Management of Engines.—In an action for damages for property destroyed by fire, where there is evidence to support a finding for plaintiff as to the origin of the fire, a nonsuit is properly refused.

Railroads—Fires—Action—Sufficiency of Evidence.—Evidence, in an action against a railroad for damages to property from a fire alleged to have been caused by defendant's engines, held sufficient to sustain a verdict for plaintiff.

. Appeal from Superior Court, Moore County; O. H. Allen, Judge.

Action by Currie & McQueen against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for the destruction by fire of the lumber plant of the plaintiff, on Sunday, the 29th of May, 1910. At the conclusion of the evidence, the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted.

The defendant requested the court to give the following instructions, which were refused, and the defendant excepted:

"That, although from the evidence introduced by the plaintiff, which raises the presumption of negligence, that the defendant did set fire to the property of the plaintiffs, yet the court charges you that, upon all the evidence introduced, you would not be warranted in charging the defendant with actionable negligence; and this is so, because the plaintiffs have done nothing more than to introduce evidence tending to show presumptive negligence, which is rebuttable, and, the defendant having introduced uncontradicted evidence to rebut that presumption, the plaintiffs cannot recover, because they have failed to go further and show, by additional evidence, that there was actual negligence, as alleged in the complainant.

"If the jury believed the uncontradicted evidence of the defendant's witness, the engine from which the damage is alleged to have come was in good condition and had a proper spark arrester and other appliances to prevent the escape of fire, and was skillfully operated and managed by a competent engineer, and the jury should answer the second issue, 'Yes.'"

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The defendant also excepted for that his honor charged the jury on the second issue as follows: "Upon this issue, the burden of proof is upon defendant to show by the greater weight of the evidence that, at the time of the escape of sparks, it had a proper spark arrester and other appliances to prevent the escape of sparks, such as are approved and in general use at the time, and that the engine and appliances were in good condition and operated in a careful way by a skillful and competent engineer."

The following verdict was returned by the jury:

(1) Was the property of the plaintiffs, referred to in the complaint, set on fire and burned by sparks from the defendant's engine at the time alleged in the complaint? Answer: Yes.

(3) Were the plaintiffs guilty of contributory negligence as alleged in the answer? Answer: No.

(2) If so, did said engines of the defendant, at the time of the escape of said sparks, have a proper spark arrester and other appliances to prevent the escape of sparks, approved and in general use at said time, and were said engines and appliances in good condition and operated in a careful way by skillful and competent engineers? Answer: No.

(4) What damage, if any, are the plaintiffs entitled to recover of the defendant? Answer: \$10,000.

There was judgment in favor of the plaintiff, and the defendant excepted and appealed.

W. H. Neal, for appellant.

D. E. McIver and *G. W. McNeil*, for appellee.

ALLEN, J. Three questions are presented by this appeal:

(1) That there was error in imposing the burden of proof on the defendant on the second issue.

(2) That, if the burden of proof was on the defendant, it was by reason of the presumption, arising from proof that the defendant destroyed the property of the plaintiffs by fire, and that this was a presumption of law and not of fact, and that, when evidence was offered rebutting the presumption, it was error to leave the question to the jury, in the absence of other evidence of negligence, and that it ought to have been decided as matter of law by the court.

(3) That it was error to refuse to nonsuit the plaintiff on all the evidence.

1. The learned counsel for the defendant urges with much force on the consideration of the court several cases in our own reports, holding that the burden of proof is on the plaintiff as to negligence, and that, while the duty of proceeding with the evidence may shift from one party to the other, the burden of the issue does not shift, and he insists, on the authority of these cases, that there was error in holding that the burden on the second issue was on the defendant.

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An examination of these decisions will show that in all of them one issue was submitted to the jury to determine the liability of the defendant, and that this issue embraced two facts: The origin of the fire, and the negligence of the defendant.

In the case before us these facts were to be settled by separate issues, and in this is to be found the distinction between the cases relied on and the one under consideration.

[1] The first issue establishes the fact that the defendant destroyed the property of the plaintiff by fire, and from this fact alone the presumption arises that the defendant was negligent. *Ellis v. R. R.*, 24 N. C. 138; *Lawton v. Giles*, 90 N. C. 380; *Manf. Co. v. R. R.*, 122 N. C. 881, 29 S. E. 575; *Hosiery Mills v. R. R.*, 131 N. C. 238, 42 S. E. 602; *Lumber Co. v. R. R.*, 143 N. C. 324, 55 S. E. 781; *Deppe v. R. R.*, 152 N. C. 82, 67 S. E. 262; *Kornegay v. Atlantic Coast Line R. Co.*, 154 N. C. 392, 70 S. E. 731. These authorities place the burden on the plaintiff to rebut the presumption of negligence, arising from proof connecting the defendant with the origin of the fire, by evidence which will satisfy the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated; and necessarily the burden of the issue embracing these facts alone is on the defendant.

2. The prayers for instruction tendered by the defendant require a consideration of the nature of the presumption in cases like this, because, if this presumption is evidence in behalf of the plaintiff, the evidence of the defendant is not uncontradicted, as the instruction required the judge to charge.

It may well to analyze the instructions before discussing them. They require the judge to decide that the evidence of the defendant is uncontradicted, and that, if believed by the jury, it is sufficient to establish the fact that the engine was properly equipped and was prudently operated by competent employees.

In many jurisdictions it is held that the presumption of negligence arising from proof that the defendant set out the fire is one of law, and generally, where this conclusion is reached, the courts approve the view contended for by the defendant that it is the duty of the court to pass on the sufficiency of the rebutting evidence, as matter of law.

This position is also supported by the case of *Williams v. R. R.*, 130 N. C. 116, 40 S. E. 979, in which it was held to be error to refuse to give an instruction substantially like those requested by the defendant.

[2] On the other hand, when the presumption is treated as one of fact, the rule usually obtains that the evidence must be submitted to the jury, who must pass on its sufficiency, and with the exception of *Williams v. R. R.*, *supra*, our court has held the presumption to be one of fact.

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In *Cox v. R. R.*, 149 N. C. 118, 62 S. E. 885, Justice Walker, speaking for the court, says: "The presumption is one of fact and not law. Evidence that the sparks were emitted from the engine and that they set fire to the timber made a prima facie case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence."

In *Deppe v. R. R.*, 152 N. C. 82, 67 S. E. 264, Justice Manning, after stating the duty imposed on the defendant, says: "If the defendant can show at the trial that it 'had used all those precautions for confining sparks or cinders,' which are approved and in general use, and the jury shall so find the fact, the trial judge will instruct them to answer the issue of negligence, 'No,' provided the precautions were used by a competent and skilled engineer, in a careful way. Rule 1 in *Williams v. R. R.*, 140 N. C. 623 [53 S. E. 448]; *Knott v. R. R.*, 142 N. C. 238 [55 S. E. 150]."

Note that, after the rebutting evidence is introduced by the defendant, it is for the jury to find the fact.

These cases and others to the same effect are cited with approval in *Kornegay v. R. R.*, 154 N. C. 392, 70 S. E. 732, where the principle is stated as follows: "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made out a prima facie case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with a proper spark arrester and had been operated in a careful or prudent manner. *Williams v. R. R.*, 140 N. C. 623 [53 S. E. 448]; *Cox v. R. R.*, 149 N. C. 117 [62 S. E. 884]."

The reasons for the rule, and its justice, are nowhere better stated than by Chief Justice Smith, in *Aycock v. R. R.*, 89 N. C. 329: "A numerous array of cases are cited in the note in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpatory circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the

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complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and, if you are not in default, show it and escape responsibility.'” The note referred to is one to *R. R. v. Schultz*, 2 Am. & Eng. R. R. Cases, 271.

The presumption is one of fact and is itself evidence of negligence, and the evidence of the defendant in rebuttal of the presumption is as to facts upon which the decision of the issue depends, and there would seem to be no reason for excepting evidence of this character from the statute which forbids the judge from expressing an opinion on the facts, or as to the weight of the evidence. If it should be held that the defendant was entitled to the instructions prayed for, the duty would be imposed on the judge to decide that there were no contradictions in the evidence of the defendant, that the witnesses were worthy of belief, and that the evidence was sufficient and satisfactory, which are matters committed by the law to the jury and not to the judge.

We conclude, therefore, that, assuming there were no contradictions in the evidence of the defendant, and that, if believed, it established the facts that the engine was properly equipped and was in charge of competent employees, and was prudently operated, this evidence cannot be said to be contradicted, and it was for the jury to pass on its weight. The evidence was contradicted by the presumption, which was some evidence of negligence.

We do not think *Williams v. R. R.*, *supra*, is in line with the other decisions of this court, and we must decline to follow it.

[3] There are, however, other valid reasons for sustaining the ruling of his honor. There was some evidence of defects in the spark arrester, coming from the witnesses for the defendant. J. R. Bissett, master mechanic of the defendant, testified that there were patches on the wire netting, and that the covering of the manhole had long openings in it instead of square ones. He also said: “The covering of the manhole was in general use before they had adopted this wire netting, and we discarded that—the master mechanics’ convention did—because the sparks would get hung in there and make a solid mass of it, and the engine would get choked and the flame would come out the furnace door when it was opened, and they would have to go in there and knock it, so they stopped this same netting to cover the manhole with. The reason those manholes with the long openings, instead of the square, were used, was that the S. A. L. had in stock a quantity of them, and we used them on the manholes to fill the bill, because there is enough opening, with what is in there, to give the engine draught enough to steam with.” It was permissible to argue from this evidence that the spark arrester in use was old and

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dilapidated, and that it had been condemned by the convention of the master mechanics. It is also doubtful if any evidence was introduced that the engine was properly operated. Two engines of the defendant passed the place of the fire within a short time of each other; one being No. 746, and the other 752.

J. M. Stoker, engineer, was the only witness examined as to the operation of No. 746, and he says nothing as to how the engine was being managed, except that he was running about 30 miles an hour when he passed the place of the fire, and the only evidence on this point as to engine No. 752 was that of N. R. Vaughan, engineer, who said he was sitting on the right-hand side of the engine, and was running at from 30 to 35 miles an hour. No inquiry was made of either as to what he or his fireman was doing, or whether or no sparks escaped from the engine he was in charge of, as it passed the property of the plaintiff. In the absence of such evidence from witnesses who knew the facts, the jury might well infer that they were silent because a disclosure would be hurtful.

3. If we are correct in our conclusion that the burden was on the defendant on the second issue, it follows that there was no error in denying the motion to nonsuit, if there was evidence to support a finding, in favor of the plaintiff, on the first issue as to the origin of the fire.

[4] In our opinion, there was sufficient evidence to support the verdict. The lumber plant, which was burned, was situated near the right of way of the defendant. Engine No. 746 passed the lumber plant about 3:10 p. m., and engine No. 752 about 3:30 p. m. The fire occurred on Sunday, and several witnesses, who had the opportunity to see, testified that they saw no smoke or other evidence of fire before the engines passed, and that the plant was burning within 15 or 20 minutes after the passing of the last engine. The engineer on engine No. 752 testified that he did not notice any smoke as he passed the plant, and one of the plaintiff's testified that he was at the plant about 1 o'clock p. m. on Sunday, and saw no evidence of fire, and that he was in the boiler room the night before at 11 o'clock, and there were then only a few sparks in the back end of the boiler well. Another witness for the plaintiffs, Mrs. Vick, testified that she noticed sparks, cinders, and heavy smoke coming from the train. If this evidence is true, there was no fire about the premises before the engines passed; sparks escaped from the engine, and within 15 minutes thereafter the property of the plaintiffs was on fire, and it was not unreasonable to conclude from these facts that the property of the plaintiffs was set on fire and burned by sparks from the defendant's engine.

We have examined all of the exceptions appearing in the record, and find no error.

No error.

ST. LOUIS, I. M. & S. RY. CO. *v.* GREESON.

(Supreme Court of Arkansas, July 3, 1911.)

[140 S. W. Rep. 143.]

Railroads—Operation—Fires—Evidence—Sufficiency.—In an action against a railroad company for firing a sawmill, evidence held to sustain a verdict for plaintiff.

Railroads — Operation — Fires — Evidence — Circumstantial Evidence.*—The firing of property by the emission of sparks from a locomotive may be proven by circumstantial evidence alone.

Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

Action by M. W. Greeson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. E. Hemingway, E. B. Kinsworthy, W. V. Tompkins, and Jas. H. Stevenson, for appellant.

Hamby, Haynie & Hamby, for appellee.

WOOD, J. This is a suit by the appellee for damages alleged to have been caused by the negligent burning of a sawmill owned by appellee at Prescott, Ark., on November 22, 1908. It is alleged in the complaint that the sawmill was situated near appellant's lines of railroad, and that same was set on fire from sparks and burning cinders escaping and emitting from one of the appellant's engines. The defendant answered, denying the allegations of the complaint.

The only question in the case as conceded by appellant is as to whether or not the evidence was sufficient to sustain the verdict of the jury. We have examined the objections to the instructions offered by appellant, and we find that the case was fairly submitted to the jury.

On behalf of appellee, one of the witnesses testified that he went north on the morning of the fire on appellant's line of railroad about one mile and a half from Prescott; that he saw no fire on the railroad or close to it; that he met train No. 5 about two miles from Prescott; that on his return to Prescott about 1 o'clock p. m. train No. 7, south bound, passed him before he reached appellee's sawmill, but that after train 7 passed him he came into town and noticed fire on both sides of appellant's track on the right of way; and that the grass had

*See foot-note of *Jensen v. South Dakota Cent. Ry. Co.* (S. Dak.), 38 R. R. R. 155, 61 Am. & Eng. R. Cas., N. S., 155; second head-note of *St. Louis, etc., R. Co. v. Shannon* (Okl.), 36 R. R. R. 74, 59 Am. & Eng. R. Cas., N. S., 74.

burned to the sawdust pile, and that there were some cross-ties burning on the railroad opposite the sawdust pile. Another witness testified that between 5 and 6 o'clock he was on Mr. Cloud's place, and that while there a train of appellant went north; that after the train went by fire blazed up in the grass on this side of the track almost opposite the mill property. The train was going out of Prescott. That was the only fire he saw there, and it seemed to be from sparks from the engine. It was opposite the mill about the blacksmith shop. He was there about an hour. The fire seemed to be burning along the track and on the railroad fence. There was testimony before the jury to the effect that it was a dry time, and that there was a pile of sawdust between the railroad and the mill, and that there was dry grass and stubble. It was also in evidence that there was an upgrade near Prescott where the appellee's mill was situated and opposite the mill. There was testimony, also, before the jury to the effect that one of the engines that passed on the day of the fire, to-wit, No. 7, had a spark arrester with holes in the meshes that were a quarter of an inch large, and that a spark the size of a pencil would go through the meshes.

It is contended by the appellant, and correctly so, that there is no direct evidence showing that any of the engines that passed appellee's property on the day of its destruction by fire were emitting cinders or sparks. But the evidence shows that it was daylight when the engine passed, and therefore it is not unreasonable to conclude that, even had the engines been emitting sparks and cinders, the same could not have been discovered. At any rate, there was positive testimony by one who had examined the spark arrester of engine No. 7, which passed that day, that the meshes of such spark arrester were large enough to have emitted sparks and cinders. Engine No. 7, that was shown to have had this defective spark arrester, passed at 1:47 p. m. One witness discovered the fire in the vicinity of the right of way and the mill at the sawdust pile immediately after train 7 went south. He says: "I didn't see the fire until I got to it. I came into town behind No. 7. When I got to the fire, it was on both sides of the track. The fire was on this side of the railroad, on the east side, on the left side coming up. The grass was burning towards the sawdust pile from the right of way. It occurs to my mind that it burned to the sawdust pile. I saw some cross-ties burning on the railroad. They were burning about opposite the sawdust pile. That was the day the mill burned. The burning of the mill, however, occurred at night." Another witness testified that between sundown and dark he was coming by the mill and saw fire in the sawdust pile close to the building. There was fire all around the mill that had been burning, smoke all around there. Another witness testified that he crossed the railroad going out of town, and

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as he crossed the track he saw a light on the right-hand side of the right of way. He returned about 9 o'clock and the mill was falling in. The fire seemed to be coming down the northeast side of mill. There was testimony from which the jury might have concluded that the fire that burned the mill did not originate in the mill plant itself, although there was some testimony from which the jury might have drawn the opposite conclusion.

In *Byers v. B. & O. R. Co.*, 222 Pa. 547, 72 Atl. 245, it is held that "though, in an action for loss by fire alleged to have been caused by sparks from a locomotive engine, the burden is on the plaintiff to prove by a preponderance of evidence that the fire was so communicated, it need not be shown that any particular engine was at fault, and the evidence may be wholly circumstantial." In the case of *Gulf, C. & S. F. Ry. Co. v. Curry* (Tex. Civ. App.) 135 S. W. 592, fire sprang up along the track and right of way of the defendant railway just after a train on said railway had passed, and this fire spread to adjoining premises, and destroyed the property of the plaintiff. Witnesses in that case testified as to the appearance of the ground after the fire, and from their description the court said it was evident that the fire began on or near the railway track and burned from there over the premises upon which the property destroyed was situated. On the other hand, witnesses for appellant testified that the fire originated on the premises destroyed some distance from the railroad right of way, and was in progress some time before the train alleged to have caused the burning passed the place of the fire. Other witnesses on behalf of appellant in that case testified as to the perfect condition of the engine, and that it was impossible for fire to escape. The court said: "This testimony raised a conflict which it was the peculiar province of the jury to determine, and, there being sufficient evidence to sustain the verdict, this court is not authorized to disturb it. If the plaintiff's witnesses are to be believed, and the jury have said they are, no other reasonable conclusion can be reached than that the fire was set out by an engine on appellant's road." In the recent case of *Central Arkansas & E. Ry. Co. v. Goelzer*, 92 Ark. 569, 123 S. W. 781, a train passed at night, and the engine was emitting sparks, flying high. Soon after the train passed appellee's barn, situated about 53½ feet from the center of the railroad track, was destroyed by fire. This court, speaking through Mr. Justice Hart, said: "The testimony on the part of the plaintiffs also tended to show that the fire occurred a short time after the engine passed; and there was no other explanation of the origin of the fire. This was sufficient evidence from which the jury might have inferred that the fire was caused by sparks emitted from defendant's engine. We cannot invade the province of

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the jury by attempting to pass upon the credibility of the witnesses, and the inferences which the jury may have legitimately drawn from the evidence are conclusive upon us. We think the jury might have found from all the facts and circumstances adduced in evidence that the fire was caused by sparks emitted from defendant's engine, and therefore we will not disturb the verdict."

The facts of the above case were no stronger to sustain the verdict of the jury than were the facts in the present case, and what was said by this court in that case is controlling here. See, also, *St. Louis Southwestern Ry. Co. v. Trotter-Minnis*, 89 Ark. 273, 116 S. W. 227; *St. L., I. M. & S. Ry. Co. v. Coombs*, 76 Ark. 132, 88 S. W. 595; *St. L., I. M. & S. Ry. Co. v. Dawson*, 77 Ark. 434, 92 S. W. 27.

[2] This court is committed to the doctrine that proof of the destruction of property by fire alleged to have been caused by the emission of sparks from the engines of railway companies may be made as well by circumstantial evidence as by positive and direct proof. We are of the opinion that the circumstances developed by the testimony in this case under the doctrine already announced by this court in several cases were sufficient to sustain the verdict of the jury.

Some objection is urged to the introduction of testimony on behalf of the appellee, but we are of the opinion that no prejudicial error resulted from this testimony. There was evidence tending to prove that the property destroyed was of greater value, and it would have warranted a larger verdict than that returned by the jury.

Finding no error, the judgment must be affirmed.

BRADLEY v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, Oct. 6, 1911.)

[132 N. W. Rep. 725.]

Appeal and Error—Questions in Lower Court—Instructions—Failure to Request.—If a defeated litigant tendered no requests to instruct the jury, a failure by the trial court to include in its charge some principle of law proper to have been mentioned will not justify reversing the case, where the issues are stated, and the charge contains no prejudicial misstatements of law.

Railroads—Fire—Spark Arresters.*—It is the duty of a railroad company to equip its locomotive engines with such appliances for the control of sparks as the progress of science and improvement demonstrates are the best for that purpose, and which are generally known, or should be known, to those in control of the construction and repair of its engines.

Railroads—Fires—Instructions—Use of Lignite Coal.—The plaintiff, in an action against a railroad company to recover damages for an alleged negligent setting out of a fire, has no just ground for complaint because the trial court instructed the jury that the carrier was not guilty of negligence in using lignite coal as a fuel, unless thereby the hazard of fire was so materially increased that a reasonably prudent man would not ordinarily have used the coal for that purpose.

Railroads—Fires—Exclusion of Evidence.†—In an action for negligently setting out a fire, where the particular engine from which the fire escaped is fully identified, it is not error for the court to exclude evidence that on other occasions fire escaped from the defendant's other engines.

Appeal and Error—Harmless Error—Instructions.—Where, upon a consideration of the entire record, it is evident that the defendant was not liable, a verdict in its favor should not be disturbed because the instructions in immaterial matters do not accurately state the law.

(Syllabus by the Court.)

Appeal from District Court, Adams County; Dungan, Judge.

Action by Albert W. Bradley against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

*See first paragraph of last foot-note of *Deppe v. Atlantic C. L. R. Co. (N. Car.)*, 37 R. R. R. 39, 60 Am. & Eng. R. Cas., N. S., 39.

†See foot-note of *McGill Bros. v. Seaboard A. L. Ry. (S. Car.)*, 38 R. R. R. 695, 61 Am. & Eng. R. Cas., N. S., 695.

Bradley v. Chicago, B. & Q. R. Co

R. A. Batty, T. A. Hollister and H. F. Fawinger, for appellant.

Frank E. Bishop and James E. Kelby, for appellee.

Root, J. This is an action for damages for the destruction of the plaintiff's barn by a fire kindled, as alleged, by reason of the defendant's negligence. The defendant prevailed, and the plaintiff appeals.

[1] There is practically no conflict in the evidence. The plaintiff principally complains that the instructions are erroneous. Since the plaintiff did not assist the trial court by requests to charge, the instructions should be sustained, unless, when considered together, they are prejudicially erroneous.

[2] The fourth subdivision of the second paragraph of the charge is criticised, because the jurors were not told that the defendant was required to equip its locomotive engines "with the best-known appliances for the prevention of the escape of fire." No such burden is by law imposed upon the defendant. If, at the time the fire escaped from the engine, the locomotive was equipped with the best or most improved appliances that were known, or that should have been known, to the defendant, and in general practical use, under such circumstances as surrounded the particular locomotive, and these appliances were in good repair, the defendant was not guilty of negligence in the matter of that equipment. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 11 Am. Rep. 550; *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 86 Mich. 615, 49 N. W. 509; *Southern R. Co. v. Thompson*, 129 Ga. 367, 58 S. E. 1044. The evidence is uncontradicted that at the time the plaintiff's barn was destroyed the locomotive was thus equipped. The assignment must therefore be overruled.

Instructions numbered 3 and 4, which relate to contributory negligence, are assailed as not applicable to the evidence. If these instructions were in no manner aided by other parts of the charge, the plaintiff might have cause for complaint; but in the tenth paragraph the jurors were told that contributory negligence could not be predicted upon the plaintiff's proper use of his property, nor was he required to take unusual precautions to protect it; and in the eleventh paragraph the jury were told in precise language that, although the plaintiff failed to use ordinary care to protect his property, he might recover, if it "was destroyed as the result of the negligence and carelessness of the defendant company." So, while there seems to be some confusion in the instructions on this subject, and the evidence tending to prove contributory negligence is slight indeed, we do not believe the jury were misled by these instructions.

[3] Instruction numbered 6 is criticised. It informed the jury that the defendant should not be held negligent in using lignite coal for fuel in its locomotive engines, unless that use

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so materially increased the hazard of fire that a reasonably prudent man would not ordinarily have used the fuel. We find no allegation in the petition that the defendant was negligent in using lignite coal; but evidence was received without objection on this point, and it may be considered as an issue tried by the parties. Without deciding whether the plaintiff might predicate a right of recovery upon the particular kind of fuel consumed in the locomotive engine, we are of opinion that in any event the instruction is as radical as the plaintiff had a right to demand. *Raleigh Hosiery Co. v. Raleigh & G. R. Co.*, 131 N. C. 238, 42 S. E. 602.

[4] The district court was right in excluding evidence tending to prove that on other occasions sparks emitted from the defendant's locomotive engines kindled fires in the town of Juniata. * The evidence definitely identified the particular locomotive responsible for the fire, if it was caused by sparks emitted from the defendant's engine, and the evidence was properly confined to the condition of that machine. *Abbott v. Chicago, B. & Q. R. Co.*, 88 Neb. 727, 130 N. W. 438.

[5] The plaintiff's brief contained an admission that the spark arresters in the defendant's locomotive were in no manner defective. The evidence is uncontradicted that none better were then in use and known to those in charge of the construction and repair of the defendant's engines, and there is no evidence tending to prove that those officials should have known of superior devices for that purpose. The evidence is also uncontradicted that there was nothing unusual in the management of the locomotive at the time the fire was set out. The engineer and fireman were skilled mechanics, accustomed to the particular run, and exercised care in controlling the engine and the fire therein. If it be conceded that the defendant's witnesses told the truth—and we detect nothing unreasonable or improbable in their testimony—the defendant was not liable for the destruction of the plaintiff's property. We do not approve all of the court's charge, but we are convinced there is nothing therein that could have misled the jury.

Finding no error prejudicial to the plaintiff, the judgment of the district court is affirmed.

TAFTE v. OREGON R. & NAV. CO.

(Supreme Court of Oregon, Oct. 3, 1911.)

[117 Pac. Rep. 989.]

Railroads—Fires—Admission of Evidence—Throwing Sparks.*—In an action against a railroad company for damages by fire claimed to have been set out by defendant's engine, evidence was admissible of the scattering of sparks generally by other of defendant's locomotives to show the general care exercised by it in equipping its locomotives; it being easy for it to show if a particular engine differed from the usual type, if that were so.

Railroads—Fires—Jury Question—Inspection of Locomotive.—Whether the spark-arresting apparatus and the locomotive causing the fire were in good condition at that time held a jury question, in an action against a railroad company for damages from the fire.

Evidence—Weight—Uncontradicted Evidence.—A jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order or carefully and skillfully operated, even though there is no direct evidence contradicting the statement.

Railroads—Fires—Actions—Burden of Proof—Negligence.†—Where a prima facie case of negligence in starting a right of way fire is made out against a railroad company, it must rebut the presumption of negligence in using its locomotives, in addition to showing that they were in good condition.

Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by I. H. Taffe against the Oregon Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for damages on account of the alleged destruction of plaintiff's cannery and cold storage warehouse by fire, occasioned by sparks emitted from defendant's locomotive. At the close of plaintiff's testimony, defendant moved for a nonsuit on the ground that no evidence had been submitted suf-

*See last foot-note of preceding case.

†For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a fire was set by a locomotive, see last paragraph of foot-note of *Westing v. Chicago, B. & Q. R. Co.* (Neb.), 38 R. R. R. 688, 61 Am. & Eng. R. Cas., N. S., 688; *Birt v. Southern Ry. Co.* (S. Car.), 38 R. R. R. 687, 61 Am. & Eng. R. Cas., N. S., 687; last paragraph of foot-note of *Carter v. Maryland & P. R. Co.* (Md.), 38 R. R. R. 142, 61 Am. & Eng. R. Cas., N. S., 142; first head-note of *Miller-Brent Lumber Co. v. Douglas* (Ala.), 37 R. R. R. 35, 60 Am. & Eng. R. Cas., N. S., 35.

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ficient to justify a verdict for plaintiff, which motion was overruled. After the conclusion of the testimony, defendant moved for a directed verdict, which motion was also denied. Plaintiff had a verdict for \$20,000, and defendant appeals. Other facts appear in the opinion.

A. C. Spencer (*W. W. Cotton* and *W. A. Robbins*, on the brief), for appellant.

A. S. Bennett (*Bennett & Sinnott*, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). It is difficult to discuss the matters included in the refusal of the court to grant a nonsuit or the motion for a directed verdict without discussing and comparing the testimony generally, and this course would involve incumbering the reports with a long detail of facts which would be entirely useless hereafter to the courts, the public, or the persons concerned. We will therefore state briefly the conclusions we have drawn from the testimony and apply the law to these findings.

The fire was discovered near the southeast corner of the cannery, between the hours of half past 1 and 2 o'clock in the afternoon of September 10, 1908. When first discovered, it was a small smoking spot, occupying only a few inches, but rapidly spread, destroying the cannery and other buildings northwesterly from the cannery. At a time variously estimated at from 10 minutes to a half hour, and probably about 15 minutes before the discovery of the fire, one of defendant's west-bound trains, drawn by a locomotive, burning coal, stopped at the platform, about 150 to 200 feet from where the fire originated; the engine being approximately in a southeasterly direction from the spot where the fire was discovered. About the time this train left, a locomotive, burning wood, of the Portage Railway, operated by the state of Oregon, and having attached to it two loaded cars, ran in on a track between defendant's track and the cannery, stopped at a distance of from 75 to 100 feet southeast from the place where the fire originated, switched to another track, and departed. The weather was exceedingly dry, the wind high, and there was no cause suggested for the fire, except that it started from the sparks from one or the other of these locomotives. From the testimony we have no doubt that it did so originate, and the principal contention of the defendant upon the trial seems to have been that the circumstances tended largely to indicate that the fire started from sparks from the locomotive of the Portage road, instead of from its own.

Under these circumstances, the direction of the wind, the condition and equipment of the locomotives, and the comparative liability of coal-burning and wood-burning locomotives to emit sparks became the principal subjects to which the testimony was

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directed. On behalf of plaintiff, witnesses were introduced, who testified substantially that the wind blew directly from where defendant's locomotive stood toward the buildings where the fire originated, and this testimony was somewhat strengthened by the circumstance that the buildings to the northwest of the cannery building were burned, while those to the west and southwest were not destroyed. There is also testimony tending to show that sparks emitted from burning coal would retain their vitality longer than sparks from wood; that defendant's train was somewhat difficult to start; that the wheels spun around on the track; and that a hard start of this character would require a greater exhaust, and probably tend to emit more sparks than if the start were easy. Defendant's witnesses claimed that the wind was practically from the east, and that the spark arrester of the Portage Railway locomotive was in bad repair and unsuitable for the purpose; and it was contended that, considering the closer proximity of this engine to the place where the fire originated, it was more probable that it was the efficient cause, or at least that the testimony left the matter in such a condition that the origin of the fire was a mere matter of conjecture and speculation.

Upon a careful consideration of the whole testimony, we do not coincide with defendant's contention. We are of the opinion that there was testimony upon which a reasonable man might well have come to the conclusion that it was more probable that the fire originated from sparks from defendant's locomotive than from the locomotive of the Portage Railway, and that it was much more probable that it originated in that manner than from any other cause. It is true that the testimony was contradictory in some particulars, but every court in this state is required to instruct the jury that it "is the judge of the credibility of the witnesses and the value and effect of the evidence," and it was for the jury to say what part of the evidence produced conviction in their minds.

[1] It is contended that the court erred in permitting evidence of the throwing of sparks by other engines of defendant, but the admission of testimony of this character has been sanctioned by other decisions of this court, and the law upon that subject may be considered as settled in this state. *Koonig v. O. R. & N. Co.*, 20 Or. 3, 23 Pac. 820; *Hawley v. Sumpter Ry. Co.*, 49 Or. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526. It is often difficult for a plaintiff to show which one of several locomotives caused a fire, although it may be certain that some one of them did so. It is in evidence here that other locomotives of defendant, passed within a short time before the fire, and, while plaintiff may have felt that it was most probable that the one going west was the source of the conflagration, he could not be absolutely certain until the facts were developed on the trial. The scattering of

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sparks generally by other locomotives was also admissible to show the general care exercised by defendant in the management and equipment of its locomotives. Plaintiff could not know beforehand the particular name, number, and type of the locomotive used on a particular train on a particular day. Railways usually have some uniformity in equipment and management, and if a particular engine differs from the usual type it is easy to point this out by testimony.

[2, 3] It is also claimed that, even admitting that the fire was kindled by sparks from defendant's locomotive, the testimony introduced by defendant, as to the inspection and good condition of its locomotive and spark-arresting apparatus, was sufficient to rebut the prima facie case of negligence made by plaintiff, and to require the court to direct a verdict. Where the evidence as to inspection and good condition is not conclusive, and it seldom is, the jury is the proper tribunal to judge of its sufficiency. As was said in *Chenoweth v. Southern Pac. Co.*, 53 Or. 111, 117, 99 Pac. 86, 88: "A jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement." This is especially the case when the statements come exclusively from the servants of the defendant, and where, as in this case, the netting of the stack was not produced for the inspection of the jury, and where defendant's report, from September 10th to the 21st, indicates that the locomotive was not sent out, or if sent out was not inspected; and further shows that on September 30th a second-hand diamond stack with new netting replaced the one in use on September 10th.

[4] It is not enough that the evidence offered by defendant should rebut the prima facie case made against it, to the extent of showing that the appliances were in good condition and suitable, but it should also rebut the presumption of want of care in the use of these; and defendant's evidence falls short of this, or, at least, a reasonable and fair juror might conclude that it did not come up to the required standard in that respect. The weather was very dry and the wind high, and, as plaintiff's witnesses contend, was blowing directly from the defendant's engine toward plaintiff's buildings. A jury might well conclude that under such circumstances it was the duty of the defendant's servants to observe such surroundings, and to use greater care to avoid a sudden and rapid exhaust and consequent increase of sparks, than would be necessary under different circumstances. It must be admitted that the case is not one entirely free from difficulty; but we do not believe that the court committed error in any of the respects claimed by defendant.

The judgment will be affirmed.

BOUCHILLON v. CHARLESTON & W. C. Ry. Co.

(Supreme Court of South Carolina, Nov. 15, 1911.)

[72 S. E. Rep. 634.]

Master and Servant—Willful Injury to Servant—Damages.—The operation of a work train at a high rate of speed on a straight track supposed to be in good condition is not of itself such willfulness as will justify punitive damages for the death of an employee on the train killed by the derailment of the engine caused by a low joint in the rails not known to the railway company, nor any of its agents prior to the accident; the track having been recently inspected.

Master and Servant—Injury to Servant—Contributory Negligence.*—A member of a train crew repairing the track was killed by the derailment of the engine of work train. The rules of the railroad company required the members of the crew to ride in shanty cars, but decedent, in violation of the rule, and without any necessity therefor, rode in the engine when it was derailed. The cars did not leave the track, and he would not have been killed had he obeyed the rules. Held, that decedent was guilty of contributory negligence as a matter of law.

Master and Servant—Action for Death—Contributory Negligence—Evidence.—That decedent was guilty of contributory negligence precluding a recovery for his death may be shown either by the evidence of plaintiff or of defendant, and, where it appeared from the entire evidence that no other reasonable conclusion could be reached except that the death was the result of decedent's negligence concurring with that of defendant, and was the proximate cause of the death, the question was for the court.

Master and Servant—Injury to Servant—Constitutional Provisions—Applicability.—Const. art. 9, § 15, giving to railroad employees, sustaining injuries, the rights and remedies allowed to persons not employees who sustain injuries, applies only to the defense of assumption of risk by an employee of a railroad company, and does not refer to the question of contributory negligence of such employee.

Appeal from Common Pleas Circuit Court of Abbeville County;
R. C. Watts, Judge.

"To be officially reported."

Action by H. M. Bouchillon, administrator of Stony Bouchillon, deceased, against the Charleston & Western Carolina Rail-

*For the authorities in this series on the subjects of contributory negligence of and assumption of risk by an employee violating a rule of his master, see first foot-note of *Southern Ry. Co. v. Johnson's Adm'x* (Va.), 38 R. R. R. 487, 61 Am. & Eng. R. Cas., N. S., 487.

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way Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. N. Graydon and *C. J. Perryman*, for appellant.

Wm. P. Greene, for respondent.

JONES, C. J. This was an action to recover actual and punitive damages alleged to have been suffered by reason of the death of the plaintiff's intestate, averred to have been caused by the negligent, willful, wanton, and reckless acts of the defendant set forth in the complaint. At the close of the evidence on behalf of the plaintiff, a motion for a nonsuit on the cause of action for punitive damages was granted, and at the conclusion of the entire testimony the presiding judge directed a verdict for defendant upon the cause of action for compensatory damages, upon the ground that the evidence established the fact that the death of the plaintiff's intestate was the result of contributory negligence on his part. The plaintiff now appeals to this court, charging error both in the granting of the order of nonsuit as to the cause of action for vindictive damages and in the direction of a verdict upon the issue as to actual damages.

While the exceptions are numerous and lengthy, they appear to present but three questions for determination, and these propositions alone are presented to this court in the argument. The appellant here contends: (1) That there was evidence to go to the jury upon the cause of action based upon the allegations of willfulness and recklessness. (2) That there was error in the holding that no other reasonable inference could be drawn from the evidence, but that the injury and death of plaintiff's intestate was due to his own contributory negligence. (3) That the act of negligence on the part of said intestate held by the court to have contributed to his death consisted in a violation of a rule of the defendant company, as to which there was evidence to go to the jury of a waiver by the defendant of such rule.

The evidence shows that the intestate was in the employ of the defendant as a member of a train crew engaged in the work of keeping in repair the track and roadbed of the defendant's railroad, his position being that of engineer of a hoisting engine placed upon a flat car by which was operated a ditching machine. The flat car contained the hoisting engine and tender and four shanty cars for the transportation and use of the employees engaged in the repair of the tracks, among whom was included the plaintiff's intestate. When this work train was being used for the transportation of the employees of defendant to the scene of their labors upon defendant's track, the assigned place of said intestate was in one of the shanty cars, and he had no duties to perform nor work to be done upon the occasion in question, requiring him to go upon the engine by which this train was drawn. Furthermore, the rules of the company then known to the plain-

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tiff's intestate forbade his riding upon the engine, and he had been warned that it was dangerous, and had been expressly forbidden to ride upon the same. Upon the day he was killed, the plaintiff's intestate boarded this work train, going first into the shanty car where he belonged, and where he remained until the train had proceeded for some distance toward the place at which the work was to be done, after which interval, and before such destination had been reached, he climbed over the top of the other cars, and went into the cab of the engine drawing the train, such action on his part being entirely voluntary and without any call of duty or necessity requiring it. This engine, running equally well either way, was then running backward and pulling the train of shanty cars, but the evidence is uncontradicted that there is no more danger upon a straight track in running such an engine backward than forward. A short time after the plaintiff's intestate had thus gone upon the engine, where he went of his own volition, without invitation and for his own private reasons, the work train left the track, and, being then upon the engine, he received injuries in this derailment which resulted in his death. As it appears that the shanty cars were not derailed or otherwise injured in this accident, and no one in those cars received any hurt whatsoever, it is evident that the death of the plaintiff's intestate was due to the fact that he was not in his proper place upon the train. There was evidence tending to show that the derauling of the engine was caused by a low joint in the rails upon the track, but there was no evidence that this defective condition was known to the defendant or any of its agents prior to the occurrence. The track had been recently inspected, and had been put in good condition a few days before. There was only testimony which tended to establish the fact that the work train in question, shortly before the happening of the wreck, was traveling at a high rate of speed, fixed by some of the witnesses at 38 miles an hour, but there is no witness who states the rate of travel at the very point in question as exceeding 10 or 15 miles an hour.

[1] The act of willfulness and recklessness on the part of the defendant being alleged to consist in the running of this train at a high rate of speed over a defective track, it is apparent that neither willfulness nor recklessness can be said to be inferable from this testimony, unless there be evidence tending to show either knowledge by the defendant of the unsafe condition or some other conscious disregard of duty by the defendant's agents, either in failing to repair the track at the point in question or in running the engine at an unsafe rate of speed. As to these matters, there is nothing appearing in the record which tends to show knowledge by the defendant, prior to the accident, of any unsafe condition of the track, nor any testimony going towards proving that the train was being run at an unsafe or

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reckless rate of speed at the time of the occurrence in question. The fact that a train was being operated at a high rate of speed at the time, if it were made to appear, would not alone be sufficient to show either willfulness or recklessness, in the absence of evidence that such speed was obviously dangerous under the facts and circumstances as they then appeared to the agents and servants of the defendant in charge of such train. But the evidence that the track at the point in question was straight, and that, upon such a track, in good condition as it was then supposed to be, it was reasonably safe to operate such a train, with the engine running backward, at a rate of speed of 35 or 40 miles an hour.

Without further rehearsing the evidence, therefore, it appears that there was an entire lack of proof to establish either a conscious failure to observe due care or a reckless disregard of safety in the operation of the train in question. There being thus no evidence to support the allegation of willfulness, wantonness, and recklessness, or either of them, it must be concluded that there was no error by the presiding judge in granting the motion for a nonsuit upon the cause of action for punitive damages. On the contrary, in the absence of such evidence, it would have been reversible error on the part of the circuit judge had this motion been refused. *Trimmier v. Railroad*, 81 S. C. 203, 62 S. E. 209. Conceding that there was some testimony tending to show negligence on the part of the defendant, even though it be but a scintilla of evidence, the circuit judge directed a verdict in favor of the defendant upon the cause of action for actual damages, upon the ground that there was no evidence in the case upon which any other conclusion could be reached by the jury than that the death of plaintiff's intestate was due to his own contributory negligence.

[2] As to the complaint of error in this ruling and direction of verdict, it is to be remarked that from the facts already recited and from the evidence contained in the entire record, which has been carefully examined, it incontestably appears that the injury and death of the intestate was the result in part of his own negligent act in going to a place of great danger upon the engine away from the place provided by his employers upon the cars and in violation of the rules of his employment, without necessity and without pretense of any call of duty or necessity. Had he remained in the car provided for his transportation, no injury would have befallen him; and it is thus apparent that his negligent act in going to a place of greater danger was a proximate cause of the injury which befell him, and without which it would not have occurred.

[3] It is immaterial by what testimony the fact of such contributory negligence was made to appear, whether it be by that introduced on behalf of the plaintiff or that offered on the part

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of the defendant, since it does not appear from the entire evidence in the cause that no other reasonable conclusion could be reached by the jury, except that the injury and death was the result of his own negligence, combining and concurring with that of the defendant, and being a proximate cause of the injury and damage in question. *McLean v. Railroad*, 81 S. C. 100, 61 S. E. 900, 1071, 18 L. R. A. (N. S.) 763, 128 Am. St. Rep. 892; *Lyon v. Railroad*, 77 S. C. 329, 58 S. E. 12; *Jarrell v. Railroad*, 58 S. C. 494, 36 S. E. 910.

As to the point raised by the exceptions that there was evidence of waiver by the defendant of the rule prohibiting employees to ride on the engine, and that, therefore, there was error by the circuit court in directing the verdict, it is to be remarked that, assuming there was evidence of such waiver, this would not necessarily affect the question of contributory negligence under the facts and circumstances. Even if there had been no such rule of the defendant company, the evidence shows that the plaintiff's intestate was guilty of contributory negligence in leaving the comparatively safe place provided for him by the master without any necessity and not in the performance of his duty, and going into a place of known and obviously greater danger. He had been told that it was dangerous to ride on the engine, and the evidence shows that he must have been conscious of the greater danger involved in his being there. The rule is applied in the case of passengers, where one voluntarily rides in a place of obvious danger, without any necessity or emergency requiring it, where he knows or by the exercise of ordinary care should have known that he is not in the place provided for him, that such passenger is guilty of contributory negligence, and cannot recover if his act does contribute to his injury as a proximate cause thereof. *McLean v. Railroad*, *supra*. No distinction upon this point can be shown between the case just cited and the one at bar, unless it be found in the fact that in this case the person injured was an employee, and not a passenger. The employee here placed himself in a situation of greater danger entirely of his own volition, without even an invitation from any agent of the defendant, leaving the comparatively safe place provided by his employer, and going to a place of obviously greater danger, and known by him to be such more dangerous position. It cannot be doubted that this act contributed directly to his injury, as a proximate cause thereof, and without which the danger would not have occurred. No reason has been shown or suggested why the same rule applied in the case of the passenger above cited should not also be applicable in this case to the employee. The same rule was applied to employees of a railroad company in the similar case of *Railroad v. Jones*, 95 U. S. 439, 24 L. Ed. 560, in the case of *Railroad Co. v. Myers*, 112 Ga. 237, 37 S. E. 439, and in many other cases which are cited in the argument of the respondent.

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[4] It is suggested in one of the exceptions that the defendant company is precluded by the provisions of article 9, § 15, of the Constitution of this state from interposing the defense of contributory negligence in this case, but this suggestion is without force, as that provision applies only to the defense of assumption of risks by an employee of a railroad company, and has no reference to the question of contributory negligence here presented. See *Bodie v. Railroad*, 61 S. C. 468, 39 S. E. 715.

There is therefore no reason either in the nature of the case or in the constitutional provision mentioned for the adoption in the case of an employee upon a railroad train of a rule as to the effect of contributory negligence different from that applied in the case of a passenger upon such train; and it must, therefore, be held that where an employee leaves the place provided for him on the train, without any call of duty or necessity or direction from a superior officer, and voluntarily places himself in a position of obviously greater peril or one known to be more dangerous, and in consequence thereof is injured or killed, even though by the negligence of the railroad company, if it appears that such act of the employee was one proximately contributing to his injury or death and without which the same would not have occurred, such act must be held as in the case of a passenger an act of contributory negligence which would defeat any right of recovery otherwise existing.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

WASHINGTON *v.* ATLANTIC COAST LINE R. CO. et al.
CHANDLER *v.* SAME.

(Supreme Court of Georgia, Aug. 15, 1911.)

[71 S. E. Rep. 1066.]

Master and Servant—Injuries to Servant—Fellow Servants—Statutory Provisions.—The provision of the railroad employer's liability act of August 16, 1909, embodied in Civ. Code 1910, § 2785, applied to the case of an employee who joined the relief department of a railroad company prior to the passage of such act, and agreed that the acceptance by him from such department of benefits "for injury" (to which department he and other members contributed, as well as the railroad company) should operate as a release and satisfaction of all claims against the company, and that the bringing of a suit for damages should forfeit all rights to benefits, but who was injured by reason of the negligence of a coemployee after the passage of the act, and who accepted certain benefits from the relief department.

Constitutional Law—Master and Servant—Impairing Obligation of Contract—Employer's Liability Act.—As applied to such a case, the provision of the act referred to in the preceding headnote, to the effect that the acceptance of benefits should not release the employing railroad company from liability, but, in case of recovery, the employer might set off any sum it had contributed or paid to any relief or benefit which may have been paid to the injured employee on account of the injury, is not violative of article 1, § 3, par. 2, of the Constitution of this state, which provides that no law impairing the obligation of contracts shall be passed.

Constitutional Law—Due Process of Law—Employer's Liability Act.—The above-mentioned act is not violative of the fourteenth amendment to the Constitution of the United States, on the ground that it abridged the privilege of the railroad company to contract, or deprived it or its relief department of the liberty of contract without due process of law.

(Syllabus by the Court.)

Certified Questions from Court of Appeals.

Action by Turner Washington against the Atlantic Coast Line Railroad Company and others, and action by A. L. Chandler against the same defendants. Heard on questions certified from the Court of Appeals. Questions answered.

The Court of Appeals certified to the Supreme Court the following questions:

"(1) A railway company prior to the year 1909, with the co-operation of certain of its employees, organized what is called the 'relief department,' for the payment to such of its employees

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as became members (or to their families) monetary benefits in case of illness, accidental injury, or death, and for that purpose a fund known as the relief fund was raised, said relief fund under the regulations adopted consisting of 'contributions from members, income derived from investments and from interest paid by the company, and advances by the company when necessary to pay benefits as they become due.' The contributions of the members were certain stipulated sums deducted from their wages each month by the company. The company had general charge of the relief department, guaranteed the fulfilling of its obligations, and paid the operating expenses thereof, holding the moneys of the relief fund in trust for the department, and paying interest thereon at the rate of 4 per cent. per annum. The company also agreed that 'if the amount contributed by the members of the relief fund, with interest and other income, shall not be sufficient to pay the benefits as they become due, the company shall advance from its own funds whatever sums may be necessary for this purpose, reimbursing itself if and when the contributions of members with interest and other income are sufficient therefor.' An employee of the company in becoming a member made the following agreement as a part of his application: 'In consideration of the amounts paid and to be paid by said company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company; * * * and, further, if any suit shall be brought against said company, or [any] other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company created by my membership in said relief fund, shall thereupon be forfeited without any declaration or other act by said relief department or said company.' Each member agreed to be bound by the regulations, one of which provided that 'in case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any companies associated therewith in the administration of their relief departments.' (A full copy of the application, contract, and regulations is incorporated in the record herewith transmitted, to which reference may be had for further details if necessary.) An employee of the railway company in question made application and became a member of the relief department in 1906, and in December, 1909, was hurt through the negligence of another employee of the railway company, who stood to him in the relation of fellow servant. The injured employee brought suit against the company and the fellow servant. It appears that he had accepted a certain portion

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of the benefits due him from the relief department on account of his injury, and that the railway company had contributed a certain part of the money so paid him. Did the fact that he had accepted these benefits operate to release the defendants, or do the provisions of the act of August 16, 1909, embodied in Civ. Code 1910, § 2785, apply, so that thereunder the defendant was entitled merely to diminish the amount of the plaintiff's recovery by a set-off of the sum it had contributed to the benefit paid to the plaintiff?

"(2) If it be held that the statute referred to in the preceding question is applicable as indicated therein, then is said statute unconstitutional as being violative of article 1, § 3, par. 2, Const. Ga. (Civ. Code 1910, § 6389), which provides that no law impairing the obligation of contracts shall be passed, and that, as applied to the case at bar, the facts of which are indicated in the preceding question, it impairs the obligation of the contract between the plaintiff and the defendant, whereby the plaintiff agreed, in becoming a member of the relief department, that acceptance of the benefits in case of injury should release the defendant from all liability on account of said injury?

"(3) If it be held that the statute referred to in the first question is applicable to the state of facts presented and therein indicated, is the statute violative of the fourteenth amendment to the Constitution of the United States, on the alleged ground that it abridges the privileges of the railway company to contract, or on the alleged ground that it deprived the railway company and its relief department of their liberty without due process of law, in that it deprives them of the liberty to make the contract in question?"

The foregoing certified questions were certified in the case of Washington. The same questions were certified in the case of Chandler, except that it was stated that the employee became a member of the relief department in July, 1909, and was injured in October, 1909, after the passage of the act of August 16th.

Osborne & Lawrence, Crawley & Crawley, R. L. Berner, and Jno. S. Walker, for plaintiffs in error.

P. W. Meldrim, Shelby Myrick, Bennet, Twitty & Reese, and Wilson, Bennett & Lambdin, for defendants in error.

LUMPKIN, J. These two cases were argued together. Three questions are raised: (1) Does the fourth section of the act of 1909, embodied in Civ. Code 1910, § 2785, apply to the character of relief arrangement or agreement and the state of facts described in the first question of the Court of Appeals? (2) If so, is that section unconstitutional as violating the clause of the Constitution of this state which declares that no law impairing the obligation of a contract shall be passed? Civ. Code

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1910, § 6389. (3) If such statute is applicable, is it violative of the fourteenth amendment to the Constitution of the United States, on the ground that it abridges the privilege of the railway company to contract? We will take up these questions in the order stated.

[1] 1. Does section 2785 of the Civil Code of 1910 apply to the facts of this case stated in the first question of the Court of Appeals? That section reads as follows: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the three preceding sections, shall, to that extent, be void: Provided, that in any action brought against any such common carrier, under or by virtue of any of said sections, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or, in the event of death, to the person or persons entitled thereto on account of the injury or death for which said action is brought." The three preceding sections contain, in brief, the following provisions: Section 2782 provides that every common carrier by railroad shall be liable in damages for a personal injury to any of its employees resulting in whole or in part from negligence of its officers, agents, or employees, or from defects or insufficiency in its engines, cars, machinery, road, works, or other equipment, due to its negligence. It declares who may sue in case of death; and that there should be no recovery, if the injured person brought about his injury by the failure to use ordinary care, or if he could have avoided the consequences of defendant's negligence by the use of ordinary care. It also deals with the question of presumption. Section 2783 applies the doctrine of comparative negligence and diminution of damages to the case of an injured employee. Section 2784 declares that the doctrine of assumption of risks of employment shall not apply where the violation by the common carrier of any statute enacted for the safety of the employees contributed to the injury or death.

It was contended that section 2785, when considered together with the other sections mentioned, did not cover a case like the one stated in the question propounded to us. We cannot acquiesce in this contention. The main purpose of the act was to enlarge the liability of common carriers by railroad for damages to employees, and to declare that certain things which previously would have prevented a recovery should not thereafter do so. One of these was the character of arrangement here involved.

A glance at the legislation in this state on the subject of recoveries for injuries to the persons of railroad employees will throw light on the legislative intent. Under the act of 1856,

BOUCHILLON v. CHARLESTON & W. C. Ry. Co.

(Supreme Court of South Carolina, Nov. 15, 1911.)

[72 S. E. Rep. 634.]

Master and Servant—Willful Injury to Servant—Damages.—The operation of a work train at a high rate of speed on a straight track supposed to be in good condition is not of itself such willfulness as will justify punitive damages for the death of an employee on the train killed by the derailment of the engine caused by a low joint in the rails not known to the railway company, nor any of its agents prior to the accident; the track having been recently inspected.

Master and Servant—Injury to Servant—Contributory Negligence.*—A member of a train crew repairing the track was killed by the derailment of the engine of work train. The rules of the railroad company required the members of the crew to ride in shanty cars, but decedent, in violation of the rule, and without any necessity therefor, rode in the engine when it was derailed. The cars did not leave the track, and he would not have been killed had he obeyed the rules. Held, that decedent was guilty of contributory negligence as a matter of law.

Master and Servant—Action for Death—Contributory Negligence—Evidence.—That decedent was guilty of contributory negligence precluding a recovery for his death may be shown either by the evidence of plaintiff or of defendant, and, where it appeared from the entire evidence that no other reasonable conclusion could be reached except that the death was the result of decedent's negligence concurring with that of defendant, and was the proximate cause of the death, the question was for the court.

Master and Servant—Injury to Servant—Constitutional Provisions—Applicability.—Const. art. 9, § 15, giving to railroad employees, sustaining injuries, the rights and remedies allowed to persons not employees who sustain injuries, applies only to the defense of assumption of risk by an employee of a railroad company, and does not refer to the question of contributory negligence of such employee.

Appeal from Common Pleas Circuit Court of Abbeville County;
R. C. Watts, Judge.

"To be officially reported."

Action by H. M. Bouchillon, administrator of Stony Bouchillon, deceased, against the Charleston & Western Carolina Rail-

*For the authorities in this series on the subjects of contributory negligence of and assumption of risk by an employee violating a rule of his master, see first foot-note of *Southern Ry. Co. v. Johnson's Adm'x* (Va.), 38 R. R. R. 487. 61 Am. & Eng. R. Cas. N. S. 487.

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way Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. N. Graydon and *C. J. Perryman*, for appellant.

Wm. P. Greene, for respondent.

JONES, C. J. This was an action to recover actual and punitive damages alleged to have been suffered by reason of the death of the plaintiff's intestate, averred to have been caused by the negligent, willful, wanton, and reckless acts of the defendant set forth in the complaint. At the close of the evidence on behalf of the plaintiff, a motion for a nonsuit on the cause of action for punitive damages was granted, and at the conclusion of the entire testimony the presiding judge directed a verdict for defendant upon the cause of action for compensatory damages, upon the ground that the evidence established the fact that the death of the plaintiff's intestate was the result of contributory negligence on his part. The plaintiff now appeals to this court, charging error both in the granting of the order of nonsuit as to the cause of action for vindictive damages and in the direction of a verdict upon the issue as to actual damages.

While the exceptions are numerous and lengthy, they appear to present but three questions for determination, and these propositions alone are presented to this court in the argument. The appellant here contends: (1) That there was evidence to go to the jury upon the cause of action based upon the allegations of willfulness and recklessness. (2) That there was error in the holding that no other reasonable inference could be drawn from the evidence, but that the injury and death of plaintiff's intestate was due to his own contributory negligence. (3) That the act of negligence on the part of said intestate held by the court to have contributed to his death consisted in a violation of a rule of the defendant company, as to which there was evidence to go to the jury of a waiver by the defendant of such rule.

The evidence shows that the intestate was in the employ of the defendant as a member of a train crew engaged in the work of keeping in repair the track and roadbed of the defendant's railroad, his position being that of engineer of a hoisting engine placed upon a flat car by which was operated a ditching machine. The flat car contained the hoisting engine and tender and four shanty cars for the transportation and use of the employees engaged in the repair of the tracks, among whom was included the plaintiff's intestate. When this work train was being used for the transportation of the employees of defendant to the scene of their labors upon defendant's track, the assigned place of said intestate was in one of the shanty cars, and he had no duties to perform nor work to be done upon the occasion in question, requiring him to go upon the engine by which this train was drawn. Furthermore, the rules of the company then known to the plain-

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tiff's intestate forbade his riding upon the engine, and he had been warned that it was dangerous, and had been expressly forbidden to ride upon the same. Upon the day he was killed, the plaintiff's intestate boarded this work train, going first into the shanty car where he belonged, and where he remained until the train had proceeded for some distance toward the place at which the work was to be done, after which interval, and before such destination had been reached, he climbed over the top of the other cars, and went into the cab of the engine drawing the train, such action on his part being entirely voluntary and without any call of duty or necessity requiring it. This engine, running equally well either way, was then running backward and pulling the train of shanty cars, but the evidence is uncontradicted that there is no more danger upon a straight track in running such an engine backward than forward. A short time after the plaintiff's intestate had thus gone upon the engine, where he went of his own volition, without invitation and for his own private reasons, the work train left the track, and, being then upon the engine, he received injuries in this derailment which resulted in his death. As it appears that the shanty cars were not derailed or otherwise injured in this accident, and no one in those cars received any hurt whatsoever, it is evident that the death of the plaintiff's intestate was due to the fact that he was not in his proper place upon the train. There was evidence tending to show that the derailing of the engine was caused by a low joint in the rails upon the track, but there was no evidence that this defective condition was known to the defendant or any of its agents prior to the occurrence. The track had been recently inspected, and had been put in good condition a few days before. There was only testimony which tended to establish the fact that the work train in question, shortly before the happening of the wreck, was traveling at a high rate of speed, fixed by some of the witnesses at 38 miles an hour, but there is no witness who states the rate of travel at the very point in question as exceeding 10 or 15 miles an hour.

[1] The act of willfulness and recklessness on the part of the defendant being alleged to consist in the running of this train at a high rate of speed over a defective track, it is apparent that neither willfulness nor recklessness can be said to be inferable from this testimony, unless there be evidence tending to show either knowledge by the defendant of the unsafe condition or some other conscious disregard of duty by the defendant's agents, either in failing to repair the track at the point in question or in running the engine at an unsafe rate of speed. As to these matters, there is nothing appearing in the record which tends to show knowledge by the defendant, prior to the accident, of any unsafe condition of the track, nor any testimony going towards proving that the train was being run at an unsafe or

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reckless rate of speed at the time of the occurrence in question. The fact that a train was being operated at a high rate of speed at the time, if it were made to appear, would not alone be sufficient to show either willfulness or recklessness, in the absence of evidence that such speed was obviously dangerous under the facts and circumstances as they then appeared to the agents and servants of the defendant in charge of such train. But the evidence that the track at the point in question was straight, and that, upon such a track, in good condition as it was then supposed to be, it was reasonably safe to operate such a train, with the engine running backward, at a rate of speed of 35 or 40 miles an hour.

Without further rehearsing the evidence, therefore, it appears that there was an entire lack of proof to establish either a conscious failure to observe due care or a reckless disregard of safety in the operation of the train in question. There being thus no evidence to support the allegation of willfulness, wantonness, and recklessness, or either of them, it must be concluded that there was no error by the presiding judge in granting the motion for a nonsuit upon the cause of action for punitive damages. On the contrary, in the absence of such evidence, it would have been reversible error on the part of the circuit judge had this motion been refused. *Trimmier v. Railroad*, 81 S. C. 203, 62 S. E. 209. Conceding that there was some testimony tending to show negligence on the part of the defendant, even though it be but a scintilla of evidence, the circuit judge directed a verdict in favor of the defendant upon the cause of action for actual damages, upon the ground that there was no evidence in the case upon which any other conclusion could be reached by the jury than that the death of plaintiff's intestate was due to his own contributory negligence.

[2] As to the complaint of error in this ruling and direction of verdict, it is to be remarked that from the facts already recited and from the evidence contained in the entire record, which has been carefully examined, it incontestably appears that the injury and death of the intestate was the result in part of his own negligent act in going to a place of great danger upon the engine away from the place provided by his employers upon the cars and in violation of the rules of his employment, without necessity and without pretense of any call of duty or necessity. Had he remained in the car provided for his transportation, no injury would have befallen him; and it is thus apparent that his negligent act in going to a place of greater danger was a proximate cause of the injury which befell him, and without which it would not have occurred.

[3] It is immaterial by what testimony the fact of such contributory negligence was made to appear, whether it be by that introduced on behalf of the plaintiff or that offered on the part

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destroyed; and in cases cited above the rule that such power may be legitimately exercised, although to some extent it may interfere with the manner of enjoying or using the grants contained in the charter, is asserted. In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, *supra*, a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of service by the grantee, after performance by the grantee, was held to be a contract within the protection of the Constitution of the United States against state legislation impairing the obligation of contracts. Nevertheless in the opinion Mr. Justice Harlan said (page 672 of 115 U. S., page 264 of 6 Sup. Ct. [29 L. Ed. 516]): "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations." In *Manigault v. Springs*, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274, riparian owners of land entered into an agreement to remove a dam obstructing a creek and to allow the creek to remain open and unobstructed. Later the Legislature of South Carolina passed an act reciting the necessity for draining the lowlands of the Santee river, and authorizing the defendants by name to erect and maintain a dam across the creek. It was held by the Supreme Court of the United States that such an act for the draining and reclamation of swamps and the erection of dams, levees, and dikes for that purpose was a legitimate exercise of the police power, and was not unconstitutional as impairing the obligation of the previous contract between the parties.

In this state, since the Code of 1863, a law has existed which reserves the right to withdraw corporate franchises, and later a constitutional prohibition against the grant of irrevocable franchises has been added. Code 1863, § 1636; Code 1910, §§ 6389, 6390. So that the question of irrevocable grants by the state after 1863 does not arise. But authorities on that subject are useful in dealing with the principle involved where such contracts could be made. It will be seen that the clause of the Constitution of the United States inhibiting the states from passing laws impairing the obligation of contracts is not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals, and that the governmental power of protection of the people cannot be contracted away.

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This is true of contracts between a state and a corporation or individual, and also of a municipality as to its legislative or discretionary governmental power. *Macon Consolidated Street R. Co. v. Mayor and Council*, 112 Ga. 782, 38 S. E. 60. "Neither can private individuals and corporations, by entering into contracts among themselves, invoke the contract clause of the Constitution for the protection of those contracts to the extent of withdrawing the exercise of rights granted, or the use of property involved, from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." 9 Enc. U. S. S. C. R. 499, and citations.

The expression "police power" is sometimes used in a very broad sense, including all legislation and almost every function of civil government. At other times it is used in a somewhat more restricted sense. The Legislature cannot arbitrarily prohibit either the making or the carrying out of all contracts under the claim of exercising police power. Thus it is clear that the Legislature could not declare that debtors could satisfy promissory notes by paying less than the amount called for by them, or that such notes should bear a greater or less rate of interest than that included in them, if valid when the contract was made. Other illustrations of contracts beyond the reach of interference by the Legislature might be given. At the other extreme stand such contracts as those involved in the liquor and lottery cases above cited. Between these two extremes lies a legal territory where cases must be determined as they arise. No inflexible line can be drawn in advance as a test for the determination of what is a legitimate exercise of the police power of the state which does not conflict with the contract clause of the Constitution, and what is an arbitrary interference with the obligation of contracts or with the liberty of contracts.

In Iowa a statute was passed which made railway companies liable to employees for damages in consequence of the negligence of its agents or other employees, and declared that no contract which restricted such liability should be legal or binding. By amendment it was added that no contract of insurance relief, benefit, or indemnity in case of injury or death entered into prior to the injury, and no acceptance of any such relief, insurance, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, should constitute any bar or defense to any cause of action brought under the provisions of the act. This act was attacked on the ground that it violated the fourteenth amendment of the Constitution of the United States, in that it impaired the liberty of contract. In *Chicago, etc., R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. —, the constitutionality of the act was upheld. In the syllabus it was said: "A state has power to prohibit contracts limiting liability for injuries made in advance

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of the injury received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract. Such a statute does not impair the liberty of contract guaranteed by the fourteenth amendment." In the opinion Mr. Justice Hughes said: "In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. * * * The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. * * * If the Legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance." Pages 570, 572, of 219 U. S., pages 263, 264, of 31 Sup. Ct. (55 L. Ed. —). The power to enact such law was thus distinctly treated as based upon the fact that it was a legitimate exercise of the police power in the protection and promotion of health, safety, and good order. It was analogized to laws prohibiting the manufacture and sale of intoxicating liquors, limiting employment in underground mines and smelters to eight hours a day, prohibiting contracts of options to sell or buy grain or other commodity at a future time, and prohibiting the employment of women in laundries more than 10 hours a day. Page 568 of 219 U. S., page 263 of Sup. Ct. (55 L. Ed. —). It is true that in the case cited the employee became a member of the relief department of the railroad after the passage of the act, and that the contention was that the statute conflicted with the fourteenth amendment to the Constitution of the United States, and not with the clause in reference to the impairment of the obligation of contracts. But "it has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution." Page 566 of 219 U. S., page 262 of 31 Sup. Ct. (55 L. Ed. —). If so, it cannot be arbitrarily destroyed by state legislation. Nevertheless it was held that the statute then under review was a legitimate exercise of the police power of the state, looking to the preservation of the safety of a considerable class of the public, who could be legitimately dealt with as a class, and that the constitutional guaranty of liberty to contract did not prevent the exercise of such police power. See, also, *Louisville, etc., R. Co. v. Mottley*, 219 U. S. 467, 484, 31 Sup. Ct. 265, 55 L. Ed. —, and citations; *Texas, etc., R. Co. v. Miller*, 221 U. S. 408, 31 Sup. Ct. 534, 536, 55 L. Ed. —.

Statutes changing, as to railroad companies, the general rule which exempts the master from liability to a servant for in-

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juries caused by the fault or negligence of a fellow servant, have been upheld by various courts. The peculiar nature of the business conducted, the conferring on railroad companies of the power of eminent domain, the dangers incident to such employment, the number of people engaged in it, and the necessity for the state to protect them have all been advanced as reasons for making a classification as to such employees, and enacting laws looking to their safety. *Georgia Railroad & Banking Co. v. Miller*, 90 Ga. 571, 16 S. E. 939, and citations; *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 South. 428, 19 Am. & Eng. Ann. Cas. 192, and note. It is not easy to see how a statute like the one under consideration can be held to be the legitimate exercise of the police power of the state looking to the public safety and welfare, or the safety of a class of the public which may be dealt with as such, and therefore valid as against a claim that it interferes with the constitutional right to contract, and yet be declared void because it affects the future operation of the contract by preventing "the like substitution of its performance" in the language of Mr. Justice Hughes. If it is a legitimate exercise of the police power for public safety in the one case, it should be so held in the other.

The theory on which agreements of the general character of that here involved have been sustained, in the absence of legislation like that contained in the act of 1909, is that the contract does not itself agree to relieve the railroad company from the legal consequences of its negligence, or that of its servants; and that the release of the company arises only upon the acceptance of benefits, which is optional with the employee after he has been injured. For this reason it has been held that such contracts did not violate statutes prohibiting contracts exempting a master from liability to a servant arising from the negligence of the master or his other servants. Thus in *Petty v. Brunswick Railway Co.*, 109 Ga. 666, 671, 35 S. E. 82, 84, in the opinion of the court referring to the argument that the benefit agreement violated a statute of the character mentioned, it was said: "As should be readily apparent, the weakness of this position lies in the fact that it is based upon an entire misconception of the meaning and effect of the contract thus assailed. It did not, as claimed, in any of its terms or conditions stipulate that the defendant company should be absolved from the legal consequences of its own negligence or that of its servants. On the contrary, it merely provided an additional remedy to that given by law to an employee who might suffer injury by reason of the negligence, actual or imputable, of his master. The latter remedy was left intact, undisturbed, and unimpaired, and the injured employee might or might not, at his option, take advantage thereof." In *Ringle v. Penn. R. R.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628, a case often cited on the sub-

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ject, it was held that "in such a case it is not the signing of the release, but the acceptance of benefits after the accident, that constitutes the release."

If this view is sound when urged for the purpose of sustaining benefit or relief agreements, it must be equally sound when urged against them, under a changed condition of the law. Thus, under these rulings, at the time the plaintiff in the present case was injured, there was no contract releasing the railroad company from damages arising from the result of its own negligence or that of its other servants, nor any fixed contract that the company should be so released; and, if a contract releasing the company was made, it resulted from the acceptance of certain benefits, and became a definite contract of release only at that time, though springing from the former contract. In the meantime the Legislature declared that no such contract of release should be valid, and that acceptance of benefits from a relief department of a railroad should not destroy a plaintiff's right of action, but that the amount of the payments or contributions of the company through such department could be set off in its favor, if it were liable in damages. The plaintiff's right of action against the railroad company for the injury to his person arose after the passage of the act of 1909, and the liability of the railroad company is to be determined by that act. It gave him a right to recover for an injury arising from the negligence of the coemployee, although he might himself have been guilty of some negligence, and declared that he should not be debarred by the doctrine of assumption of risks of employment as therein stated. This was different from what would have been the status had he been injured before its passage. It also contained the clause under discussion. Before any contract of release by accepting benefits from a fund arising from a common contribution had been made, the act of 1909 was adopted. We have endeavored to show that the act was a legitimate exercise of the police power of the state for the preservation of the safety and welfare of a considerable class of the public. If the benefit agreement should be held to prevent such exercise of the police power of the state from being effective, the power of the state to preserve and protect the safety and welfare of its citizens could be much curtailed by contract. Under such a construction, although a police law might be on its passage, and about to take effect, prohibiting a certain thing from being done, parties might enter into an agreement, not making a present settlement, or a contract now fixing liability, but reserving the right to do such thing, or to elect to do it, after the passage of the act, and in spite of its provisions. This would subordinate the police power of the sovereign state to the operation of contract, not the reverse, as the authorities declare. The second question of the Court of Appeals is answered in the negative.

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[3] 3. The contention that the act of 1909 is violative of the fourteenth amendment to the Constitution of the United States is practically covered by what has already been said. It is only necessary here to again cite the case of Chicago, etc., R. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259 (55 L. Ed. —); Mobile, etc., R. Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. —; Louisville & Nashville R. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921. The third question of the Court of Appeals is answered in the negative. All the Justices concur, except BECK, J., absent and ATKINSON, J., disqualified.

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(Supreme Court of Michigan, July 5, 1911.)

[132 N. W. Rep. 109.]

Master and Servant—Injury to Servant—Contributory Negligence.*

—A railroad employee riding on the top of a freight car on a spur track running into a sawmill and yard need not anticipate that in stringing wires over the track the law fixing the minimum height of wires had been violated, and, where he does not know of the existence of telephone wires, he need not learn at his peril of their existence, but he need only exercise a reasonable observation of the surroundings in the light of his experience for his safety.

Master and Servant—Injury to Servant—Contributory Negligence—Special Findings—General Verdict.—Where, in an action for injuries to a railroad employee struck by telephone wires while riding on the top of a freight car on a spur track, plaintiff testified that he did not know of the presence of the wires, and that he did not face in the direction in which he was going, but turned his back to the

*For the authorities in this series on the subject of the contributory negligence of railroad employees injured by structures or objects over or near tracks, see last foot-note of *West v. Chicago, etc., Ry. Co.* (C. C. A.), 37 R. R. R. 663, 60 Am. & Eng. R. Cas., N. S., 663; last paragraph of foot-note of *Redmond v. Quincy, etc., R. Co.* (Mo.), 37 R. R. R. 283, 60 Am. & Eng. R. Cas., N. S., 283; second foot-note of *Heilig v. Southern Ry. Co.* (N. Car.), 36 R. R. R. 501, 59 Am. & Eng. R. Cas., N. S., 501.

For the authorities in this series on the question whether a person injured through the negligence of another had the right to assume that the latter had performed or would perform the duties owing to the person injured, see last paragraph of last foot-note of *Acton v. Fargo & Moorhead St. Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; last foot-note of *Arkansas, etc., Ry. Co. v. Graves* (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259; first foot-note of *Hillis v. Spokane, etc., R. Co.* (Wash.), 38 R. R. R. 744, 61 Am. & Eng. R. Cas., N. S., 744; last foot-note of *St. Louis, etc., R. Co. v. Carr* (Ark.), 37 R. R. R. 92, 60 Am. & Eng. R. Cas., N. S., 92.

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engine to look at the track which was somewhat out of repair, a special verdict that he could have seen the wires had he looked, and that he was familiar with the rules of the company requiring extreme care by employees while riding on the top of cars when passing obstructions, did not conclusively establish his contributory negligence, and did not control a general verdict in his favor.

Master and Servant—Injury to Servant—Contributory Negligence.*
—A railroad employee, ignorant of the existence of telephone wires over a private spur track, who, in the discharge of his duties, rides on the top of the car on the track instead of on its side or instead of climbing to the locomotive, is not guilty of contributory negligence merely because he assumes a perilous position, since his position becomes perilous only because of the existence of the wires.

Master and Servant—Injuries to Servant—Misleading Instructions.
—Where, in an action for injuries to a railroad employee struck by telephone wires while riding on the top of a car, the court stated the claims of the parties, and directed the attention of the jury to plaintiff's claim that he had never observed the wires, and did not observe them at the time of the accident, an instruction that, if he had actual knowledge of the wires, it was his duty to protect himself, and, if he did not do so, he was guilty of contributory negligence, and the jury must determine whether he knew that the wires were there or whether he could in the exercise of ordinary care have discovered them, was not misleading as limiting plaintiff's knowledge of the danger of the wires to the time of the accident.

Trial—Instructions—Undue Prominence to Particular Matters.
Where, in an action by a servant for personal injuries, the court stated what plaintiff must prove and defined preponderance of evidence, burden of proof, negligence, and contributory negligence, and declared that plaintiff must affirmatively show negligence of defendant and freedom from contributory negligence, the instructions were not objectionable for failing to give equal emphasis to the different elements to be established by plaintiff.

Error to Circuit Court, Charlevoix County; Frederick Mayne, Judge.

Action by Warren M. Meyers against the Detroit & Charlevoix Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before OSTRANDER, C. J., and BIRD, BROOKE, BLAIR, and Stone, JJ.

Clayton L. Bailey (*Cooley & Hewitt*, of counsel), for appellant.
Elisha N. Clink (*Stephen H. Clink*, of counsel), for appellee.

OSTRANDER, C. J. Defendant operates a railroad through the village of Alba. At that place a sawmill and yard are maintained by Tindle & Jackson. Prior to December, 1907, defendant had

See (*) on page 153.

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constructed and maintained a spur track into this yard for the accommodation of Tindle & Jackson. This spur was known as siding No. 1. In December, 1907, defendant constructed a second spur from siding No. 1, which was known as siding No. 2. The siding last constructed passed near the office of Tindle & Jackson. At the time said siding was constructed, there was in existence a telephone line (two wires) which crossed both sidings and was attached to a pole nailed to one corner of the office building. After siding No. 2 was completed, December 20, 1907, and when the first engine of defendant passed over it, it was found that the wire was so low as to catch upon the higher parts of the engine. It was lifted over by defendant's employees, to permit the engine to pass in onto the siding, but, when the engine returned to the main track, it was found to have been cut or broken down, and the loose ends thrown away from the track. The record does not disclose by whom the wires were cut. It does appear, however, that they were replaced next day by an employee of the Swaverly Telephone Company. Some time later they were broken again by some unknown agency, and they were again replaced by the same employee, but at a somewhat greater height. At no time, however, were they placed as high as 22 feet above the established grade of the siding, as required by statute. The wires remained in approximately the same position from December 20, 1907, to May 22, 1908, when plaintiff was injured. Plaintiff had been employed by defendant for seven years as night watchman, brakeman, freight conductor, fireman and again as brakeman, baggageman, and expressman, which last-mentioned duties he was performing at the time of his injury, and for some months prior thereto. During the five months preceding the accident some 200 cars had been placed upon one or other of the sidings, both of which passed under the wires, a great many of said cars being handled by the crew of which plaintiff was a member. He testified that he was familiar with the tracks of both sidings, but said, however, that he could not recollect ever having been over siding No. 2 but once before the day of his injury and upon that occasion he was handling a flat car. He further testified that he did not know that the wires were there. On May 22, 1908, plaintiff, with his conductor, rode upon the engine in upon the siding No. 2, under the wires in question, and to the farther end of the siding, for the purpose of taking out a box car. When the engine reached the car, plaintiff went to the rear end of the car, turned the angle cock, climbed the ladder, and released the brake. He then went forward to the front end of the car where he could observe his conductor, who was between the engine and car, cutting in the air which operates the brake. Observing that his conductor was all right, he signaled to the engineer to proceed. He then remained standing upon the top of the car, but, instead of facing in the direction in which he

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was going, he turned his back to the engine for the purpose (he testifies) of looking at the track of the siding, which was somewhat out of repair. While in this position, he came in contact with the wires in question, which threw him down, and, as the car passed beneath him, dragged him to the rear end of the car and against the brake-staff with such violence as to break two of his ribs. He also claims that as a result of the injury a hernia of long standing was enlarged, and his sense of hearing was impaired.

The rules of defendant, with which plaintiff testified he was familiar, provide, in part, as follows:

"Rule 20. Extreme care must be taken by all employees riding on top of or on the side of freight cars in passing buildings and other obstructions. The cars running over the road are of different heights and size, some of them not allowing a man to stand on top or ride upon the side while passing by bridges, buildings, and other obstructions. All employees must carefully inform themselves on this point and take care to avoid injury to themselves for this cause.

"Rule 21. Cars running over this road are equipped with different kinds of ladders, some having the ladders on the end, others on the side, some having stirrups on the bottoms of the car bodies and others without. Trainmen and switchman will examine ladders of all cars and note the situation and condition before making use of same. * * *

"Rule 22. At many stations on the road there are cattle guards within station limits. Trainmen and switchmen working about yards or at such stations are required to exercise great care to avoid injury in passing over such cattle guards.

"Attention is also called to the necessity of equal care in working about switches at stations and in yards to avoid injury by having feet caught in frogs, switches, and guard rails.

"Jumping on or off cars or engines in motion, entering between cars in motion to couple or uncouple them, and all similar imprudences are forbidden.

"Every employee is required to exercise the utmost caution to avoid injury to himself or fellow employees especially in coupling, switching, or other movements of cars and trains. * * *

"Rule 31. An employee observing any obstructions or damage to the road or bridges, or observing any circumstances that indicate danger in any way, will leave at nearest telegraph station a written report of the same, and will take such further steps as will insure safety. All such reports must be telegraphed by the agent or operator to the general manager, and notice of the instruction or danger must be given to conductors of all trains, until orders are received from the general manager to discontinue such notice."

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Two of plaintiff's witnesses who saw the accident, one from a point 200 feet distant, and the other from a point from 100 to 125 feet distant, testified that the wires were plainly visible from where they stood. A witness for defendant who stood aside to let the train pass at a point 125 or 150 feet away from the wires testified that, after the train passed, he saw that plaintiff was in danger from the wires, and that he tried, without success, to get his attention by calling to him.

The following special questions were submitted to and answered by the jury:

"Was the track cleared and the wires removed therefrom when the engine came out after the initial trip in on the siding? Answer. Yes.

"When Meyers stood on the box car and gave the signal to go ahead, could he have seen those wires if he had looked? Answer. Yes.

"Was the plaintiff, Meyers, familiar with the rules of the company introduced in evidence? Answer. Yes."

These answers were accompanied by a general verdict for plaintiff. In the brief for appellant it is said: "The defendant relies for reversal of the judgment principally upon the grounds that the plaintiff was guilty of contributory negligence as a matter of law; that the answers of the jury to the special questions are inconsistent with its general verdict; and that the court erred in its charge to the jury concerning the knowledge which plaintiff had at the time of his injury that the wires were there (assignment No. 16) and in its charge upon the burden of proof (assignment No. 17)." The argument is limited to the matters stated. Whether the special verdict is controlling depends upon whether the fact that plaintiff could have seen the telephone wires, had he looked, conclusively establishes his want of due care. Plaintiff testified that he did not know the wires were there. If he did not, was he necessarily at fault because he did not look for them? If a failure to look for them is excused, the special and general verdict may stand together. It is natural for one to look for, and to avoid if necessary, those things which experience has shown may exist. In a particular case there may be a duty to know whether any peril, expected and usual, or unexpected and unusual, exists.

[1] Speaking generally, and with respect to the particular and unlawful obstruction created by the wires, plaintiff's duty was not a duty to learn at his peril whether they were there. He owed a duty of reasonable observation of the surroundings in the light of experience. He was not required to anticipate that in stringing wires over the track the law would be violated. No wires strung at a lawful height would have imperiled him.

[2] It is common knowledge, and if not it may become so by experiment, that a single telephone wire carried at an elevation is not always easily visible to one who is actually looking for it.

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Two of such wires stretched at some distance from each other, as is usual, are not always easily discernible. One might or might not see them without considerable effort. And if two persons from different points were looking for the same wire, one might discover it easily and the other with difficulty. One may be generally observant, even diligently observant, of surroundings, without discovering telephone wires in the air, especially when their presence there is not expected. Therefore we are not prepared to say that because plaintiff might have seen the wires had he looked for them, or might have seen them as he approached them, his negligence is conclusively established.

[3] It is said that the position of plaintiff was a perilous one, deliberately assumed. It was only perilous because there were two telephone wires stretched across the track at an unlawful height. Plaintiff went upon the car in the discharge of his duty. He could ride out of the siding upon the top of the car, upon its side, or, probably, he might have climbed to and upon the locomotive. Of these courses open to him, it would seem that that remaining upon the top of the car was the least dangerous, if the wires were not there, and, if he did not know about the wires, it would seem the least dangerous to him. In brief, everything that plaintiff did appears prudent enough if we accept the fact that he did not know about, and had no good reason to apprehend, the presence of the wires. This cannot be said of the conduct considered by this court in *Benage v. Railway Co.*, 102 Mich. 72, 60 N. W. 286, and decision in that case and in *Glover v. Scotten*, 82 Mich. 369, 46 N. W. 936, turns upon the point that the position assumed by the plaintiff was inherently as well as comparatively dangerous, and that a comparatively safe place had been provided. Nor do the facts bring the case within the rule applied in *Carr v. Grand Trunk R. Co.*, 152 Mich. 138, 115 N. W. 1068, a case like many others in which the basis for decision was the duty of plaintiff to familiarize himself with the location of all permanent structures along a siding. Upon the whole record, the question of plaintiff's negligence appears to be one of fact, determined in plaintiff's favor by the general verdict.

[4] It is assigned as error that the court in instructing the jury referred them with respect to the plaintiff's knowledge to the particular occasion. The language used was: "But, if the plaintiff had actual knowledge of the existence of this wire, then it was his duty to protect himself, and, if he did not do so, he was guilty of contributory negligence and cannot recover. So it will be necessary for you to decide whether on this occasion the plaintiff knew that the wire was there. Or, in other words, could he or would he, provided he was in the exercise of ordinary care on that occasion, have discovered it?" The court first stated the respective claims and positions of the parties in a manner which counsel announced to be satisfactory. The language quoted, con-

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sidered with the remainder of the charge, does not limit plaintiff's knowledge of the danger of the wires to this particular occasion, and does permit the jury to find that if he had previous knowledge, or, if he ought to have acquired the knowledge that they were there, he could not recover. In the immediately subsequent portion of the charge the attention of the jury is directed to plaintiff's claim that he had never before been so far back on the siding and had never observed the wires, and did not observe them on the occasion of his injury. We cannot think the jury misapprehended the statement of the court.

[5] Upon the subject of the burden of proof, it is said that the court failed to give equal emphasis to the different elements to be established by plaintiff. In various phrasing the court stated all that plaintiff must prove and the meaning of the terms "preponderance of evidence" and "burden of proof." He said the plaintiff in order to recover must show the negligence of the defendant, his freedom from negligence, and that he had sustained injury. He defined "negligence" and "contributory negligence," and said plaintiff must affirmatively show negligence of defendant and freedom from negligence on his part.

We are of opinion that reversible error is not made out, and that the judgment should be affirmed.

CHEICHI v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, Nov. 25, 1911.)

[118 Pac. Rep. 916.]

Trial—Instructions Cured by Others.—In an action against a railway company for injuries to a servant who was aiding in moving a car, which jumped the track, an instruction that if the jury were unable to determine by a preponderance of evidence whether the car was in an unsafe condition, or, if it was, whether the jumping was caused by the dangerous speed combined with its unsafe condition, judgment must be for defendant, when taken with other instructions that judgment must be for defendant unless satisfied by the preponderance of evidence that the car was not safe and the jumping of the track was a result of its unsafe condition, and that, unless satisfied that the unsafe condition of the car was the cause of its jumping the track, verdict must be for defendant, could not have misled the jury, and the error, if any, in failing to distinguish between a dangerous speed for a car in good or bad repair, was cured.

Master and Servant—Injuries.*—There can be no recovery by a servant, injured while operating a defective car with others, unless

*For the authorities in this series on the question whether an employee can recover for injuries sustained through his own, or his

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the injury was caused solely by the defective condition of the car, and not by the excessive speed with which it was operated.

Trial—Instructions—Construction as a Whole.—Though detached statements or expressions of the court in its charge may be technically erroneous, yet, if the instructions as a whole fairly state the law, there is no available error.

fellow servant's negligence in using a defective appliance furnished by the master, see *Koreis v. Minneapolis, etc., R. Co. (Minn.)*, 36 R. R. R. 256, 59 Am. & Eng. R. Cas., N. S., 256 (whether engineer is justified in attempting to operate temporarily repaired engine to next station); *Pratt v. Southern Ry. Co. (Ala.)*, 35 R. R. R. 751, 58 Am. & Eng. R. Cas. 751 (switchman attempting to mount foot-board of approaching switch engine while standing between rails barred recovery for his injuries, although the foot-board and the handhold on the engine were defective, and it was his right as switchman to ride on foot-board); *Erie R. Co. v. Schomer (C. C. A.)*, 35 R. R. R. 303, 58 Am. & Eng. R. Cas., N. S., 303 (switchman's negligence in attempting to cross front end of coal car, on which there was no platform or end sill, instead of adopting some other method); *Craig v. Great Northern Ry. Co. (Wash.)*, 34 R. R. R. 675, 57 Am. & Eng. R. Cas., N. S., 675 (proximate cause of collision at crossing was negligence of injured conductor in permitting motorman to run car at excessive speed, though brake did not work properly); *El Paso, etc., R. Co. (U. S.)*, 31 R. R. R. 308, 54 Am. & Eng. R. Cas., N. S., 308 (boarding moving open water car, and injured by reason of giving way of iron hand rail); *Foley v. Boston & N. St. Ry. Co. (Mass.)*, 31 R. R. R. 251, 54 Am. & Eng. R. Cas., N. S., 251 (injured motorman was not justified in running his car as if nothing was the matter with its brake); *Chicago, etc., Ry. Co. v. Murray (Ark.)*, 29 R. R. R. 791, 52 Am. & Eng. R. Cas., N. S., 791 (brakeman holding by obviously defective standard, when giving signals, instead of the regular hand hold provided); *New York, etc., R. Co. v. Hamlin (Ind.)*, 22 R. R. R. 701, 45 Am. & Eng. R. Cas., N. S., 701 (switchman's negligence in using dangerous method of making coupling, and not the rail protruding from brake beam, was proximate cause of his injury, and precluded recovery); *Choctaw, etc., R. Co. v. Thompson (Ark.)*, 26 R. R. R. 417, 49 Am. & Eng. R. Cas., N. S., 417 (brakeman attempting to make coupling with defective apparatus, instead of crossing track and using lever on another car); *Southern Ry. Co. v. McGowan (Ala.)*, 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353 (occupying certain position on hand car where he fell because of defect in handle of car); *Schlemmer v. Buffalo, etc., Ry. Co. (U. S.)*, 26 R. R. R. 190, 49 Am. & Eng. R. Cas., N. S., 190 (contributory negligence of employee as affected by absence of automatic couplers in violation of federal act); *Hairston v. United States Leather Co. (N. Car.)*, 26 R. R. R. 595, 49 Am. & Eng. R. Cas., N. S., 595 (defense of contributory negligence was not available where employee's injury was result of failure to equip cars with automatic couplers, unless his conduct amounted to recklessness); *McGrath v. Delaware, etc., R. Co. (N. J.)*, 6 R. R. R. 334, 29 Am. & Eng. R. Cas., N. S., 334 (attempting to stop car from running down grade, with rotten sprag); *Murphy v. Baltimore, etc., R. Co. (Ky.)*, 7 R. R. R. 295, 30 Am. & Eng. R. Cas., N. S., 295 (brakeman discovering defective condition of coupling only at moment of attempt to use it was not guilty of contributory negligence as matter of law); *Drake v. San Antonio, etc., Ry. Co. (Tex.)*, 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157 (slipping of defective rail hook which injured employee was using in unloading car).

Cheichi v. Northern Pac. Ry. Co

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Luigi Cheichi against the Northern Pacific Railway Company. From an order granting a motion for new trial after verdict for defendant, defendant appeals. Reversed.

C. H. Winders, for appellant.

Frank E. Green, for respondent.

DUNBAR, C. J. [1] This action was brought to recover damages on account of personal injuries sustained by the respondent while in the employ of appellant as a track and section hand. It is alleged in the complaint that, on the day of the accident, the plaintiff was ordered to go aboard and ride upon one of the defendant's cars; that, while on such car in obedience to the direction of the appellant, the car jumped and leaped from the rails, causing the injury complained of. This car in question had been a track car, and had been reconstructed into a push car. The plaintiff and 34 of his fellow workmen had been ordered to get the car and move some rails, and, while the car was in operation and under the control of the plaintiff and his fellow workmen, it jumped the track, and the accident happened. The charge in the complaint is that the defendant wrongfully and carelessly failed and neglected to perform its duty, in that it had suffered said car to become greatly worn and out of repair in many particulars mentioned, and that it had carelessly employed and furnished incompetent, careless, and negligent operators to control said car. But no attempt was made at the trial to establish the allegations in relation to incompetent and inexperienced operators, and it conclusively appeared that the operation of the car was under the control of the fellow workmen of the respondent. The case was submitted to the jury, and verdict was rendered in favor of the defendant, the appellant here. Upon motion for a new trial, the court came to the conclusion that it had erred in a certain instruction given to the jury, and for that reason the motion for new trial was granted, and from the granting of such motion this appeal is taken.

The particular instruction upon which the court granted the motion for a new trial was as follows: "If you are unable to determine by a preponderance of the evidence whether the car was in an unsafe condition or not, or, even if it was, whether that was the cause of the jumping the track, if the jumping of the track was the result of a dangerous rate of speed combined with an

For the authorities in this series on the subject of the right to recover for an injury to an employee resulting from the negligence of his fellow servant concerning with that of the master or his representative, see last foot-note of *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 35 R. R. R. 48, 58 Am. & Eng. R. Cas., N. S., 48.

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unsafe condition of the car, and if it would not have jumped except for the speed, then plaintiff has not satisfied you by a preponderance of the testimony of the facts necessary to entitle him to recovery." The court, upon a re-examination of this instruction, concluded that it was misleading, for the reason that it did not distinguish in the instruction between what might be a dangerous rate of speed for a car in good condition and a dangerous rate of speed for a car not in good condition, if the jury should find that this car was not in good condition. We think the learned judge criticised his instruction too technically, and that the jury was in no way misled. The court in this instruction said no more to the jury than it had said in a preceding instruction, viz., in effect, that the injury must be the result solely of such defective car.

[2] It is true that, if the jumping of the track was the result of a dangerous rate of speed combined with an unsafe condition of the car, the plaintiff should not be allowed to recover, for, under the conceded facts of the case, the unsafe condition of the car would not have been the sole cause of the accident if it had been combined with a dangerous rate of speed. As to the distinction in rate of speed between a car in good condition and one which was not in good condition, the jury would naturally understand that the dangerous rate of speed spoken of by the court was with reference to the particular car under consideration, the condition of which was an issue in the case. In any event, the whole instruction on this question shows that the jury could not possibly have been misled. The court had previously told the jury: "Unless you are satisfied by this preponderance of the testimony that this car was not reasonably safe, then you cannot find for the plaintiff; and, even though you should be satisfied that the car was not in a reasonably safe condition for its use in the business for which it was being applied, that still would not be enough, for you must be further satisfied by a preponderance of the evidence that the jumping of the track was the result of this unsafe condition." In another place it was said by the court: "Unless plaintiff satisfied you that it was in an unsafe condition, and that that was the cause of its jumping the track, your verdict must be for the defendant." In many places in the instruction the law was expressly stated to the jury, in language so terse and clear that their duty was plainly presented to them; and under such instructions it is unreasonable to conclude that the instruction upon which the new trial was granted, conceding that it was cloudy and indefinite, would erase from the mind of the jury or in any way affect their understanding of the issues plainly presented by the whole instruction.

[3] It is the settled rule of this court that, although detached statements or expressions of the court in its charge to the jury may be technically erroneous, yet, if the instructions as a whole

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fairly state the law, there is no prejudicial error. It was said by this court in the syllabus to *Seattle Gas, etc., Co. v. Seattle*, 6 Wash. 101, 32 Pac. 1058: "Although detached expressions in the court's charge to a jury, if considered as independent expressions, may be technically erroneous, yet if the instructions as a whole, and considered together, fairly state the law, in no wise misleading to the jury, there is no prejudicial error." And in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111: "The whole instruction must be construed together. So construed, it was not error. It is true that this sentence is not technically correct. * * * This court has frequently held that, where an isolated portion of an instruction, standing alone, may be technically erroneous, yet if the whole instruction, taken together, fairly states the law, it will be upheld." In *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187, 68 Pac. 440, it was said: "Prior to using this language, the court distinctly and clearly defined to the jury the issues involved, and further on instructed them, not only that the respondents must sustain their case by a fair preponderance of the evidence, but that the jury were the sole and exclusive judges of the facts. Conceding, therefore, this particular part of the instruction, standing alone, to be of doubtful meaning which is certainly all that can be successfully claimed, the jury could not, in the light of the whole instruction, have understood that the court meant thereby to tell them that it was established by a preponderance of the evidence that the harness was totally destroyed." What is said in this case applies with especial directness to the case at bar. The same doctrine was announced in *Neal v. Phoenix Lumber Co.*, 117 Pac. 267, in *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355, and in a long line of unbroken authority.

This case falling within the rule announced in those cases, the judgment will be reversed.

CROW, MORRIS, and ELLIS, JJ., concur.

ST. LOUIS, I. M. & S. R. CO. v. McWHIRTER.

(Court of Appeals of Kentucky, Nov. 17, 1911.)

[140 Fed. Rep. 672.]

Master and Servant—Death of Servant—Railroads—Hours of Labor Law—Negligence Per Se.—Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of employee of common carriers, is mandatory, so that, where a flagman on a railroad train was killed in the course of his duty, after he had been compelled to work more than 16 hours, in violation of such act, the continuance of his employment for a longer period than 16 hours constituted negligence per se on the part of the railroad company, and was the proximate cause of his death, for which it was liable.

Master and Servant—Death of Servant—Railroads—Hours of Service—Concurring Negligence.—Decedent, a flagman on one of defendant's trains, after being compelled to work longer than 16 consecutive hours, in violation of Hours of Service Law (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), was ordered by his engineer to throw a switch, and to perform such direction passed along the footboard of the engine to the ground. While walking ahead of the engine to the switch he stumbled and fell, and before he could get off the track was struck and killed. He was in view of the engineer all the time, and if the engineer had been looking the reversal of the engine and the application of the air brakes at the time decedent fell might, in all probability, have stopped the engine in time to have enabled him to regain his feet and escape, but the engineer was not looking, and did not know of the accident until he observed a signal from the telegraph operator. Held, that the negligence of the engineer was a cause of decedent's death, concurring with the negligence of the defendant in violating the hours of service law, for either of which causes defendant was liable.

Master and Servant—Railroads—Hours of Service Law—Constitutionality.—Hours of Service Law (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), is not unconstitutional, because not limited in terms to employees engaged in interstate commerce.

Trial—Instructions—Form.—Where instructions given are substantially correct, mere inaptness of statement is not available error.

Appeal and Error—Request to Charge—Necessity.—In the absence of a request for an instruction on the measure of damages, defendant could not object on appeal that no such instruction was given.

Appeal and Error—Instructions—Omission to Charge—Measure of Damages.—Where, in an action for death of a railroad flagman, 30

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years of age, with an expectancy of 27 years, the jury rendered a verdict in plaintiff's favor for \$3,000 only, such verdict cured error in omitting to charge on the measure of damages.

Appeal and Error—Review—Necessity of Exceptions.—Refusal to grant a petition for the removal of a cause to the federal court for diversity of citizenship cannot be reviewed, where no exception was taken to the ruling at the time.

Appeal from Circuit Court, Hickman County. .

Action by Cordie McWhirter, as administratrix of the estate of Etwal McWhirter, deceased, against the St. Louis, Iron Mountain & Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. T. Bullock and *R. T. Railey*, for appellant.

Eaton & Boyd, for appellee.

SEATTLE, J. This action was brought in the Hickman circuit court by appellee, as administratrix of the estate of her deceased husband, Etwal McWhirter, to recover of appellant, its conductor, and engineer damages for his death, which occurred at Wolf Lake, Ill., at which place one of appellant's trains ran over his body; he being at the time in appellant's employ as a flagman on the train.

It was, in substance, alleged in the petition, as amended, that in his capacity as flagman, and by direction of his superiors, appellee's intestate left Ilmo, Mo., on the train in question at 3:30 o'clock p. m., February 22, 1910, for a run to Bush, Ill., and was killed at Wolf Lake, Ill., on the return trip at 7:37 o'clock a. m., February 23, 1910, by the negligence of appellant, its agents and servants, in compelling him to remain continuously on duty as flagman on the train for more than 16 consecutive hours, and also by the negligence of the conductor and engineer of the train in operating it.

It was further alleged in the petition, as amended, that the train by which the appellee's intestate was killed was, at the time of his death, engaged in interstate commerce—that is, in the business of transporting freight between Missouri and Illinois; that in requiring the intestate to serve as a flagman on its train for a longer period than 16 consecutive hours appellant violated the provisions of section 2, c. 2939, United States Compiled Statutes, being part of an act of Congress, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," which became a law March 4, 1907; and also the provisions of another act of Congress, entitled "An act relating to the liability of common carriers by railroads to their employees in certain cases," which became a law April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]).

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Appellant's answer, except with respect to appellee's appointment and qualification as administratrix and right to sue as such, traversed the averments of the petition as amended, and in addition alleged that in entering its service as a flagman appellee's intestate by contract assumed the ordinary risks incident to that service; that his death was an unavoidable accident, and resulted from an ordinary risk, such as he contracted to assume, for which reason the law imposed upon appellant no liability for his death. These averments were controverted by reply, and on the trial the jury returned a verdict, awarding appellee \$3,000 damages. Appellant complains of the judgment entered upon the verdict and the refusal of the circuit court to grant it a new trial; hence this appeal.

[1] Section 2, c. 2939, United States Compiled Statutes, upon which appellee's action was based, reads as follows: "Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted to again go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permit to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in cases of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week: Provided further, the Interstate Commerce Commission may, after full hearing in any particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

The evidence shows beyond doubt that the train on which the intestate was a flagman left Illmo, Mo., at 3:30 p. m., February 22, 1910, for its regular run to Bush, Ill., and return; and that, in returning from the latter place to Illmo on the following day (February 23, 1910), the train ran over and killed the intestate at Wolf Lake, Ill., a town and station situated on appellant's rail-

road. There is some doubt under the evidence whether the intestate's death occurred at 7:35 or 7:37 a. m., February 23, 1910, but none whatever that it was as late as 7:35. Guess, appellant's engineer, at the time in charge of the train, testified at the coroner's inquest, immediately following the accident, that the intestate's death occurred at 7:37 a. m., February 23d, but later testified, in giving his deposition for use on the trial in the court below, that it occurred at 7:35 a. m., February 23d.

Geo. C. Loper, a witness introduced on the trial by appellant testified that the intestate was killed at 7:37 a. m., February 23, 1910, and no attempt was made by appellant to prove that he was killed earlier than 7:35 a. m. of that day, or that the intestate had not, when killed, been in service as flagman on the train for as much as 16 hours and 5 minutes consecutively.

It is immaterial, therefore, whether his death occurred at 7:35 or 7:37 a. m., February 23, 1910, as it is patent from the evidence that it occurred after more than 16 consecutive hours of continuous service by him as a flagman on the one train operating between Illmo, Mo., and Bush, Ill.

In thus requiring of the intestate more than 16 consecutive hours of service, albeit the excess of service over the 16 hours was but 5 or 7 minutes, appellant violated the statute, *supra*; and, as the death of the intestate from the act of his engineer complained of occurred while he was engaged in the required continuous service, and after the expiration of the 16 consecutive hours allowed by the statute, there seems to be no escape from the conclusion that the act of appellant in thus extending his service beyond the statutory limit was negligence per se, to which the intestate's death must, as a matter of law, be attributed, and, if so, the right of appellee to maintain this action cannot be questioned.

[2] We also find from the averments of the petition, as amended, that appellee asserts the right to recover of appellant the damages claimed, on the ground that the death of her intestate was also attributable to the negligence of the conductor and engineer in charge of the train. The record fails to show any negligence on the part of the conductor, other than his act in continuing the train crew on duty longer than 16 consecutive hours; but there was some evidence tending to show negligence on the part of the engineer, from which the jury had the right to determine whether it was a concurring cause of the intestate's death.

It appears from the testimony of the engineer himself that the intestate's death occurred under the following circumstances: When the train reached Wolf Lake, the intestate, whose place as flagman was at the front end of the train, was notified by the engineer that it would stop over at that place on account of the 16-hour law. The intestate was then in the cab of the engine,

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and he at once stepped out of the engine and along the footboard, from which he got to the ground ahead of the engine, for the purpose of throwing a switch that the train might be sidetracked. Although in view of the engineer all the time, the latter admitted he did not look to see where he was, or what he did. Very soon after the intestate left the engine, the engineer observed the Wolf Lake telegraph operator excitedly signaling him to stop the train, which was then moving at the rate of three or four miles an hour. The engineer immediately stopped the train, and upon stepping off the engine was told by the operator he had run over the intestate, whose body he found under the tank wheel cut in two. In reply to the direct question "How was he killed?" the engineer said: "Performing his duty; going out to set a switch."

According to the testimony of the operator, Loper, who seemed to be the only eyewitness to the accident, the intestate left the engine as described by the engineer, and ran toward the switch, but fell between the rails before reaching it. He then got upon his hands and knees, but before getting to his feet was run over by the engine. When he fell, the operator began signaling the engineer to stop the train, but the latter failed to observe the signals in time to stop the engine before it ran over the intestate.

There was no proof that the manner in which the intestate approached the switch was not the usual and an ordinarily safe way of doing so and of setting the switch; and as he was in plain view of the engineer from the time he left the engine, or would have been if the engineer had maintained a lookout in that direction, the latter, knowing he was going in front of the engine, should have kept such lookout for his movements; had he done so there was nothing to prevent his seeing his fall, and with the train going at only three or four miles an hour the reversal of the engine and application of the air brakes might, and in all probability would, have stopped the train in time to enable the intestate to regain his feet and make his escape.

If appellee's right of recovery had depended alone upon her ability to show that her intestate's death was caused by the negligence of the engineer, there was, as we have seen, evidence conducing to prove such negligence. It is, however, proper to say that the negligence of appellant's engineer in the particular mentioned, and that of its conductor, or some other servant in control of its transportation department, in keeping appellee's intestate on duty as a brakeman for a longer period than 16 consecutive hours, concurred in causing his death, and all being servants of appellant their negligence is chargeable to it. Therefore, the question of proximate cause raised by counsel for appellant can have no part in our consideration of the case.

Recurring to the appellant's violation of the provisions of the statute prohibiting it from requiring its employees to remain on

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duty longer than 16 consecutive hours, we find that the language of the provision in question is mandatory, and that the duty it imposes is a definite, absolute duty. Its nonperformance may not, therefore, be excused by a showing on the part of the railroad company that it used ordinary care or reasonable diligence to perform it, but was unable to do so. The violation of such a statutory duty is therefore negligence per se. Our meaning cannot be better expressed than in the language of the following excerpt from the opinion of the Georgia Supreme Court, in the case of *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068:

"Every violation of any of those duties of omission or commission, which, arising from man's estate as a social being, has received recognition by the law of the land, either generally or specifically, is an act of negligence. So long as these duties remained undefined, or defined only in abstract, general terms, a breach is not properly denominated negligence per se; but when any specific act or dereliction is so universally wrongful as to attract the attention of the lawmaking power, and this concrete wrong is expressly prohibited by law or ordinance, a violation of this law—a commission of the specific act forbidden—is, for civil purposes, correctly called negligence per se. In those jurisdictions in which the application of the facts to the law rest with the jury, the court cannot primarily declare that any particular concrete act or state of circumstances amount to a breach of duty, unless the law so expressly declares. This finding is left to the jury; but if the law itself puts its finger on a particular thing, and says, 'This is wrong,' the court may also (for there is no question to a fact which the law says exists) put its finger on that same thing, and say, 'This is negligence—negligence per se.' This artificial distinction between negligence per se and negligence not per se respects, therefore, merely the method by which the existence of negligence is to be ascertained in particular instances. When once its existence is determined, whether through the court's judicial cognizance, or the jury's findings, as a matter of fact, there is no further distinction made, and the one form of negligence has in the further consideration of the case just the same effect as the other—no more, nor less."

We have repeatedly recognized the rule here announced. Thus, in *National Casket Co. v. Powar*, 137 Ky. 156, 125 S. W. 279, which was an action to recover damages against the owner of an automobile by one whose horse was frightened and himself injured, by the alleged negligence of the person in charge of the machine in failing to slacken its speed and give the signals of its approach as required by section 2939g, Kentucky Statutes (Russell's St. § 322), we, in commenting on the effect of a failure to obey the statutory standards of care, in the opinion said: "The evidence for the plaintiff was that Moore did not sound

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any warning whatever; that he was driving the machine at a very high rate of speed; and that he did nothing towards respecting the safety of the ladies, except swerve to the right so as to well miss their vehicle. These facts presented prima facie a case of negligence. The failure to sound the horn or other similar contrivance to signal the approach of the car was a violation of the statute, was per se negligence, and if the injury to the plaintiffs was occasioned thereby, being a proximate result of such failure, appellants are liable to respond in damages." Nashville, Chattanooga & St. Louis R. R. Co. *v.* Higgins, 92 S. W. 549, 29 Ky. Law Rep. 89; Cumberland Tel. Co. *v.* Yeiser, 141 Ky. 15, 131 S. W. 1049, 31 L. R. A. (N. S.) 1137.

In addition to the above authorities in this jurisdiction, we cite the following cases of like import, decided by the courts of last resort of other states: Vandever *v.* Moran, 79 Neb. 431, 112 N. W. 581; L. & N. R. R. Co. *v.* Hynes (Ind. App.) 91 N. E. 962.

Our attention has not been called to any case in which the precise question upon which it is here sought to hold appellant responsible for the death of appellee's intestate has been passed on; but we find that the constitutionality of the act of March 4, 1907, was sustained by the Supreme Court, in Balto. & Ohio R. R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878. The case arose on a bill in equity to annul an order made by the Interstate Commerce Commission, which required the carriers within the provisions of the act in question to make monthly reports, under oath, showing the instances where employees subject to the act had been on duty for a longer period than 16 consecutive hours. In the opinion it is said:

"Although the question was not specifically raised by the bill, it is now contended that the statute is unconstitutional in its entirety, and therefore no action of the Commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that, while addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employees engaged in business. The prohibitions of the act are found in section 2. This provides that it shall be 'unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee, subject to this act to be or remain on duty' for a longer period than that prescribed. * * * But the argument undoubtedly involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are

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engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employees who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. * * * The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of its employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons placed within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract, as guaranteed by the Constitution. *Chicago, B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328. If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated, either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations."

[3] It appears that other objections were made to the validity of the statute: That it was void for uncertainty; that the Interstate Commerce Commission was without authority to require the reports called for by its order; and that to compel the disclosures by these reports of violations of the law would be contrary to the fourth and fifth amendment to the Constitution of the United States, having reference to unreasonable search and seizure and privilege against self-crimination. These objections were all elaborately considered in the opinion and disposed of adversely to the contentions of the railroad company.

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The case, *supra*, effectually disposes of the objections raised in this case by counsel for appellant to the constitutionality of the act in question, and renders further consideration thereof by us unnecessary.

While, as previously stated, we have been referred to no case determining the carrier's liability for the death of a train employee while engaged in its service, in violation of the restriction contained in the act, limiting such service to 16 consecutive hours, we find numerous cases which, in construing that part of the act, and a previous act, relating to the equipment of cars engaged in interstate commerce with safety appliances, hold that it abolishes the fellow-servant doctrine and also the doctrine of assumption of risk; furthermore, that if a railroad in the operation of its cars violates a duty enjoined by the provisions of the act, which results in injury to an employee, such violation imposes upon it the duty to make compensation to the person injured. *United States v. Atchison, T. & S. F. R. Co.*, 163 Fed. 517, 90 C. C. A. 327; *Watson v. St. Louis, Iron Mountain & Southern R. R. Co.* (C. C.) 169 Fed. 942; *Southern R. R. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907; *U. S. v. Atlantic Coast Line R. R. Co.* (D. C.) 153 Fed. 918; *U. S. v. Southern R. R. Co.* (D. C.) 135 Fed. 122; *U. S. v. Great Northern R. R. Co.* (D. C.) 150 Fed. 229. In other words, as held in *St. Louis, Iron Mountain & Southern R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061: "The obvious purpose of the Legislature (i. e., Congress) was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does in point of fact use cars which do not comply with the standard, it violates the plain provisions of the law, and there arises on that violation the liability to make compensation to one who is injured by it."

In *Chicago, B. & Q. Ry. Co. v. U. S.*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, it was held that a carrier using, in moving interstate traffic, cars whose condition do not satisfy the requirements of the safety appliance act cannot escape the penalty therein prescribed by showing that it exercised reasonable care in equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection, as the statutes impose an absolute duty upon the carrier, which is not discharged by the exercise of reasonable care or diligence.

In the opinion delivered by Mr. Justice Harlan, the reasoning and conclusions of the court, in the leading case of *St. Louis, I. M. & S. R. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, were adopted, following which it is said: "It cannot then be doubted that this court in the *Taylor Case* considered the scope and effect of the safety appliance act of

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Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section, relating to automatic couplers, imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that nonperformance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers, or reasonable diligence in using them and ascertaining their condition from time to time. That the Taylor Case, as decided by this court, has been so interpreted and acted upon by the federal courts generally is entirely clear, as appears from the cases cited in the margin. * * * The Taylor Case was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury alleged to have been caused by the negligence of the corporation; whereas, the present action is to recover a penalty. This difference, it is suggested, will justify a re-examination, upon principle, of the rule announced in the Taylor Case. In effect, the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that 'a certain sum, or sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by a civil action, even if it may also be recovered in a proceeding which is technically criminal.' *Hepner v. U. S.*, 213 U. S. 103 [29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739]. * * * The power of the Legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."

As further illustrating the harmony of opinions manifested by the federal courts with respect to this question, consideration of the very recent case of *Delk v. St. Louis & S. F. R. R. Co.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, will be found instructive. Delk sued the St. Louis & San Francisco Railroad Company, a Missouri corporation, engaged in commerce as a carrier of freight and passengers, through Missouri, Tennessee, and other states, for damages resulting from injuries he sustained while engaged in the discharge of his duties as a brakeman of the railroad company. On the petition of the railroad company the case was removed to the Circuit Court of the United States, on the ground of diversity of citizenship. The basis of the plaintiff's claim, as set forth in the declaration, was the alleged failure of the railroad company to provide proper automatic couplers as required by the safety

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appliance act. The answer of the railroad company traversed the averments of the declaration, and pleaded contributory negligence on the part of the plaintiff.

It appears from the facts presented by the record that the car with the defective coupler which caused the injury was loaded with lumber, and had been received by the railroad company to be carried to Memphis, Tenn.; the latter delivered it to the Union Railway Company for transportation to its destination. After receiving the car and before moving it, the Union Railway Company discovered that it was provided with a defective coupler, and immediately returned it to the defendant railroad, which placed it on a side track in its yard, where it was examined by its inspector, who put upon it a placard, containing the words "out of order." On the following day, Delk was injured in an effort to couple the defective car to another for its removal from the side track. Owing to its defective coupling, he could not couple the cars without going between them, which he did, and in attempting with his foot to hold the drawbar of the defective car until the coupling of the cars could be effected by the impact his foot was caught between them and crushed.

On the trial the circuit court seemed to have instructed the jury, in substance, that, as a matter of law, the statute imposed upon the railroad company the absolute duty to keep its cars provided with the character of coupling appliances described in the statute, and that in failing to so provide the car by which Delk was injured, and in attempting to move the car in its defective condition, it was guilty of negligence which entitled him to recover, unless he was himself guilty of negligence, which so contributed to his injury that, but for such negligence, he would not have been injured. So the only issue submitted to the jury was as to the question of contributory negligence.

The trial in the circuit court resulted in a verdict and judgment in favor of Delk for \$7,500, which that court compelled him, by remittitur to reduce to \$5,000. The Circuit Court of Appeals reversed the judgment and remanded the case for a new trial, following which the Supreme Court allowed a writ of certiorari, and upon a review of the errors assigned, that court reversed the judgment of the Circuit Court of Appeals, and affirmed the judgment of the circuit court.

In an able opinion delivered by Mr. Justice Harlan, the following conclusion was expressed: "As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for review of the action of the circuit court. *Lutcher & M. Lumber Co. v. Knight*, 217 U. S. 257 [30 Sup.

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Ct. 505, 54 L. Ed. 757]. In this view the judgment of the Circuit Court of Appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute under which the case arose imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. But, on looking further into the record from the circuit court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in *Chicago, B. & Q. R. R. Co. v. United States*, just decided. Nor did the circuit court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore the reversal of the judgment of the Circuit Court of Appeals, on the ground we have above stated, constitutes no reason why the judgment of the trial court should be disturbed."

It should be stated in this connection that at the time of the trial of the Delk Case, and until the original safety appliance act of 1893 was amended by that of April 22, 1908, contributory negligence on the part of a person injured by a defective car could be relied upon by a railroad company as a ground of defense, in an action under the safety appliance statute for such injury; but the amendment in question, which was in force when the appellee's intestate in the instant case was injured, excludes such a defense. *Schlemmer v. Buffalo R. & P. Co.*, 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596. As the defense of assumption of risk was abrogated by the original act, neither of these doctrines has any place in this case.

In view of the foregoing authorities, state and federal, we conclude that the facts alleged by appellee in her petition, and fairly sustained by the evidence appearing in the record, fasten upon appellant responsibility for her intestate's death. If the grounds of defense interposed by the appellant's answer would be unavailing, had the intestate's death been caused by a defective appliance on one of its cars, they must, upon principle, be held equally so, where the death was caused by its wrongful act in requiring him to continue in the performance of his duties as a brakeman in its service, beyond 16 consecutive hours, even though the negligence involved in the act was only a concurring cause, operating with the negligence of its engineer, in bringing about the death.

The requirements of the statute with respect to the safety appliances to be used on appellant's trains are no more imperative or mandatory than is the statutory restriction here involved upon its right to suffer its employees to engage in its service more than 16 consecutive hours. The violation of the statute

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in either case invites the penalty prescribed, and the offender will not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements.

Appellant did not attempt to bring itself within the provisions of section 3 of the act of March, 1907, for its answer contains no plea that its violation of the statute was occasioned by casualty, unavoidable accident, the act of God, or any other cause allowed by that section as an excuse.

In our view of the case, there was no error in the trial court's refusal to give the peremptory instruction asked by appellant, and it is not perceived that any just reason is presented for its objections to the instructions that were given to the jury.

Instruction No. 1 authorized a verdict for appellee, if the train by which her intestate was killed was, at the time, engaged in interstate commerce, and his death was caused by the negligence of the engineer in operating the train. We are unable to see any error in this instruction. It is conceded the train was engaged in interstate commerce; but whether so or not, if the intestate's death resulted from the negligence of the engineer alone, appellant would, as master, be responsible therefor, independently of its negligence in violating the 16-hour law.

Instruction 2 merely defines the meaning of the words "interstate commerce," and is unobjectionable in form.

Instruction 3 properly defines negligence, as used in the instructions; and by instruction 4 the jury, in substance, were told that, if they believed from the evidence appellee's intestate had been permitted or required by appellant to remain on duty as a brakeman continuously for more than 16 consecutive hours, immediately before his death, appellant was negligent by reason thereof, and liable in damages for the intestate's death, if they further believe from the evidence such negligence contributed to his death; and if they so believed they should find for appellee such damages as resulted from appellant's negligence in thus causing her intestate's death, not to exceed \$25,000, the amount claimed in the petition. This instruction correctly stated the law on the feature of the case intended to be covered by it, and, as our reasons for this conclusion have already been fully stated, further elaboration of them is unnecessary.

Instruction 5 is but the converse of instruction 4, and, while unnecessary, was not improper.

[4] Instructions 1, 2, 4, and 5, might have been more aptly expressed, but, being substantially correct, mere inaptness of statement furnishes no ground for condemning them.

[5] Appellant complains, however, that there was no instruction given the jury on the measure of damages. This is true, and such an instruction should have been given; but the failure of the court to give it is not ground for a reversal, because appellant did not ask such an instruction, although others were requested by it with reference to other features of the case.

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In *Louisville & Nashville Railroad Co. v. Roberts*, 70 S. W. 833, 24 Ky. Law Rep. 1160 we said: "It has been so frequently held that it is deemed unnecessary to again elaborate the idea that, in a civil case, unless the objecting party offers an instruction covering the point of his objection, he will not be heard upon appeal to complain of the inadequate instruction given." *Swann-Day Lumber Co. v. Thomas*, 129 Ky. 799, 112 S. W. 907; *Patterson v. T. J. Moss Tie Co.*, 97 S. W. 399, 30 Ky. Law Rep. 9; *L. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233, 25 Ky. Law Rep. 250.

[6] We have also held that, where an improper instruction as to the measure of damages has been given, the error would be cured by the verdict of the jury, if such verdict be as small as it would have been, had the proper instruction been given. *Ky. Distillery & Warehouse Co. v. Barret*, 112 S. W. 643; *Katterjohn v. Nahm et al.*, 106 S. W. 1179, 32 Ky. Law Rep. 727. As appellee's intestate was a young man, about 30 years of age, with an expectancy at least of 27 years, it is apparent that the destruction of his power to earn money damaged his estate even more than the \$3,000 awarded by the verdict of the jury; it is patent, therefore, that the appellant's rights were not prejudiced by the failure of the court to give an instruction on the measure of damages.

[7] Appellant also complains of the refusal of the circuit court to remove the case to the United States Circuit Court for the District of Kentucky. It appears that the courts of the several states are, by the provisions of the statute, *supra*, and the amendment of April 22, 1908, given jurisdiction concurrent with that of the courts of the United States, in cases arising under the statute. It is true appellant's petition rested its right to be removed on the ground of diversity of citizenship, but, as it took no exception to the action of the court in refusing the removal, its complaint of the removal will not now be entertained.

In conclusion, we are moved to say that the salutary object designed by the enactment of the statute, *supra*, would, in our opinion, be defeated if we should hold its provisions inapplicable to a case like the one at bar. Its aim is the protection of the lives of employees of railroad companies, and also the lives and property intrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation, as well as the use of good machinery and appliances, are needful to the health and safety of men engaged in the hazardous work of railroading, and that the benefit it is intended to confer will better enable them to serve their employers and promote the ends of commerce. The application of the provisions of the statute may sometimes bear

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harshly upon an offending railroad company, but on the whole their just enforcement, in all proper cases, is bound to be promotive of the public welfare.

The errors assigned not justifying a reversal, the judgment is affirmed.

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(Supreme Court of Colorado, Nov. 6, 1911.)

[118 Pac. Rep. 971.]

Carriers—Injury to Passenger—Negligence of Employees—Statutory Liability.*—Mills' Ann. St. § 1508, giving an action against a railroad company for death resulting from negligence of an employee while managing a train, etc., makes a company liable for death of a passenger in a collision between trains, caused by an operator negligently failing to stop a train for orders.

Words and Phrases—"Managing."*—"Managing" means to have under control and direction; to guide; and employees in charge of the stopping and starting of a train are "managing" it, within Mills' St. § 1508.

Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action by John E. Whittle and wife against the Denver & Rio Grande Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Section 1508, Mills' Statutes, is as follows:

"Whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars * * * the corporation * * * in whose employ any such officer, agent, servant, (or) employee * * * shall be at the time such injury is committed, * * * shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand (5,000) dollars and not less than three thousand (3,000) dollars, which may be sued for and recovered:

*For the authorities in this series on the subject of the application of employers' liability acts, see *Slaats v. Chicago, etc., Ry. Co.* (Iowa), 39 R. R. R. 228, 62 Am. & Eng. R. Cas., N. S., 228; first foot-note of *St. Louis, etc., R. Co. v. Ramsey* (Ark.), 38 R. R. R. 787, 61 Am. & Eng. R. Cas., N. S., 787; *Knitter v. Chicago, etc., Ry. Co.* (C. C. A.), 38 R. R. R. 771, 61 Am. & Eng. R. Cas., N. S., 771; first foot-note of *Cahill v. Illinois Cent. R. Co.* (Iowa), 36 R. R. R. 618, 59 Am. & Eng. R. Cas., N. S., 618.

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"First: By the husband or wife of deceased; or

"Second: If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of deceased; or

"Third: If such deceased be a minor or unmarried, then by the father or mother who may join in the suit. * * *"

One Archibald Whittle, while a passenger on a train operated by defendant, was killed by a collision between the train upon which he was riding and a train also operated by the defendant company. The collision occurred in the nighttime. Plaintiffs in error, the parents of deceased, brought suit against the defendant company to recover the penalty provided in the statute above quoted. In their complaint they alleged, so far as necessary to notice, in order to present the question we are required to determine, that the trains on the line of defendant's road over which the trains in question were being operated were run, stopped, and started by the employees in the immediate charge thereof, and passed each other at designated points, as directed by its train dispatcher, stationed at the city of Pueblo, by means of telegraphic directions sent by him to its agents at the various stations along its road, it being the duty of the agent receiving such directions to deliver the same to the conductor and engineer of the approaching train, for whose guidance it was intended; that it was the duty of the agent receiving directions to be delivered to the conductor and engineer of an approaching train at nighttime to display a colored light, known to defendant's conductors and engineers as the "stop signal," and, in case no message or directions were to be delivered to the employees in charge of such train, to display a white light, which such employees knew meant for them to proceed, without stopping at the station where such "proceed signal" was displayed; that the agent of defendant in charge of its station at Swallows received from the train dispatcher at Pueblo a telegram, directing that the train upon which plaintiffs' son was a passenger should meet and pass another train approaching from the opposite direction at Beaver, instead of Adobe, as the employees on the train for which such instructions were intended had theretofore been instructed; and that such agent not only failed to signal this train to stop, or deliver to the conductor or engineer the telegraphic direction, informing them where they should meet and pass the train approaching from the opposite direction, but left displayed at the station of Swallows the "proceed" signal, which negligence caused the train to pass that station, and shortly thereafter to collide with the train which it would have met and passed at Beaver, had the agent at Swallows not been guilty of negligence in the particulars alleged.

To this complaint a general demurrer was interposed and sustained. Plaintiffs elected to abide by their complaint, where-

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upon judgment was entered in favor of the defendant, and the action dismissed. Plaintiffs have brought the case here for review on error.

Wm. J. Miles, for plaintiffs in error.

E. N. Clark, for defendant in error.

GABBERT, J. (after stating the facts as above). [1, 2] The only question presented for determination is whether or not the defendant is responsible under the statute for the negligence of its agent at Swallows. According to the averments of the complaint, defendant's trains were run and conducted from point to point along its road by the employees in immediate charge thereof, under the directions of its train dispatcher, communicated to such employees by its station agents, to whom such directions were sent, by means of signals displayed, and delivering to the conductors and engineers of its trains the directions intended to advise them, among other things, where the trains they were operating should meet and pass other trains. Had it been the purpose of the statute to limit its provisions to the employees in the immediate charge of a train, it would have so declared, instead of using the expression "any officer, agent, servant or employee whilst running, conducting or managing any * * * train of cars." "Managing," as defined by Webster, is "to have under control and direction; * * * to guide." The employees in the actual charge of a train stop, start, and advance it, and in so doing are running, conducting, and managing it; but, according to the averments of the complaint, they are not in the absolute control or management of the train which they are running or conducting. On the contrary, they advance, stop, and start their trains under the directions of the train dispatcher, communicated to them by its station agent, to whom such directions are sent, by means of signals displayed, and delivering to them the directions of the dispatcher; so that the movement of trains is directed and controlled (1) by those who direct their movements, and (2) by the employees whose duty it is to run their trains in obedience to such directions.

The orders of the train dispatcher can only become effective, and his control over trains exercised, by the agent to whom such orders are sent performing the acts which his duties require. Where he has orders for delivery to a conductor and engineer for their guidance in running their train, he is thereby charged with directing its movements in the manner his duties impose. To the extent that his duties require him to control or direct the movements of a train, he is certainly "managing" it. If he fails to discharge these duties, the statute is violated. It was the duty of the agent at Swallows, when he received directions from the train dispatcher, advising the conductor and engineer

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of the train upon which plaintiffs' son was riding that they should meet and pass the train approaching from the opposite direction at Beaver, instead of at Adobe, to have displayed the "stop" signal, and delivered to the conductor and engineer the directions he had received from the dispatcher. To this extent, and for these purposes, the train in question was under his control. The object of the directions sent to him was to prevent the collision that occurred. Had he exercised that control and directed over the train which his duties required, it would have been prevented. From the language of the statute, it seems clear that it embraces an employee whose duty it is to control or direct the movement of a train.

The judgment of the district court is reversed, and the cause remanded, with directions to overrule the demurrer.

Judgment reversed.

Musser and Hill, J. J., concur.

HAYNES' ADM'RS v. CINCINNATI, N. O. & T. P. R. Co. *et al.*

(Court of Appeals of Kentucky, Nov. 2, 1911.)

[140 S. W. Rep. 176.]

Master and Servant—Injuries—Sufficiency of Evidence—Negligence.—In an action against a railroad company and one of its engineers for the negligent death of a fireman by a boiler explosion, evidence held not to show any negligence by the engineer.

Words and Phrases — "Misfeasance" — "Nonfeasance."—"Misfeasance" is the performance of an act, which might lawfully be done, in an improper manner, resulting in injury to another, while "nonfeasance" is the nonperformance of an act which should be performed.

Master and Servant—Servant's Liability to Third Persons—Liability for Nonfeasance.*—A servant is liable for injuries to third persons caused by his nonfeasance, as well as those caused by his misfeasance.

Negligence—Liability.—One is liable for injuries resulting from his failure to perform a duty to the person injured through negligence, inattention, or willfulness.

Master and Servant—Servant's Liability—Injuries to Third Persons—Defects in Appliance.*—Since an employee ordinarily has no right to select the machinery used by him, a railroad engineer is not personally liable for injuries to a third person from defects in the locomotive which the company furnished him and required him to run.

*See extensive note, 20 R. R. R. 468, 43 Am. & Eng. R. Cas., N. S., 468 (personal liability of agents or servants to third persons for injuries from negligence); first foot-note of *Ward v. Pullman Car Corp.* (Ky.), 31 R. R. R. 548, 54 Am. & Eng. R. Cas., N. S., 548.

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Removal of Causes—Grounds—Diverse Citizens—Renewal of Motion.—Where it appears at trial of a case against two defendants, only one of whom is a resident of the state, that there is a failure of proof against the resident defendant, and it does not appear that a better case could have been made when the action was begun, the nonresident defendant may renew a motion theretofore made at the proper time, to transfer to the federal courts on the ground of fraudulent joinder of defendants; whether the joinder of defendants is legally fraudulent being determined by the facts appearing in the record, and not solely from the allegations of the petition for removal.

Courts—Rule of Decision—United States Supreme Court.—The state Supreme Court is bound to follow decisions of the United States Supreme Court upon the question of the removal of causes to the federal courts.

Appeal from Circuit Court, Pulaski County.

Action by E. L. Haynes' administrators against the Cincinnati, New Orleans & Texas Pacific Railroad Company and William Hudson. From an order directing a verdict for defendant Hudson, and from an order removing the action against the railroad company to the federal court, plaintiffs appeal. Affirmed.

H. C. Faulkner & Sons and Sharp, Bethurum & Cooper, for appellants.

O. H. Waddle & Son, for appellee.

CARROLL, J. This action was brought to recover damages for the death of E. L. Haynes, a fireman on appellee's railway, and who was killed in the state of Tennessee. The company and William Hudson, the engineer in charge of the engine on which appellant was a fireman, were made defendants. The negligence upon which the action was grounded is stated in the petition as follows: That while Haynes was employed as a fireman, "and in the line of his employment and duties as such, the boiler and engine exploded, and threw great quantities of hot steam, water, and other matter upon his body, scalding and burning him so badly that he soon thereafter died from the effects thereof; and that the said explosion of the boiler and engine resulted from and was immediately caused by serious and dangerous defects on and in the same, and that but for which defective and dangerous condition of the boiler and engine, and its attachments, the same would not have exploded, or the intestate received the injuries stated. They state that the dangerous and defective condition of the boiler and engine and its attachments were well known to the defendants the Cincinnati, New Orleans & Texas Pacific Railway Company, and William Hudson, the engineer in charge of the engine, and superior to Haynes in point of service, or could have been known to them by the exercise of ordinary care in

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time to have prevented the explosion; and that the dangerous and defective condition of the engine and boiler and attachments was unknown to the deceased, and could not by the exercise of ordinary care have been known to him in time to have prevented the injuries and death aforesaid. They state that the accident above set forth and described, and the death of their intestate, H. L. Haynes, was caused by the gross carelessness and negligence and wrongful acts of the defendants, and that their said negligence and carelessness was joint and concurrent."

In an amended petition, the law of Tennessee, setting out the circumstances under which damages may be recovered in actions like this, was pleaded, and it was subsequently agreed: "That under the laws of the state of Tennessee, and in force at the time of the infliction of the injuries of plaintiffs' intestate referred to and complained of in the petition, and still in force, an engine-man and fireman in charge of and operating a locomotive engine of a railroad company or corporation operating a railroad in said state, and while such engine is being operated therein, such engineman and fireman are fellow servants, and the railroad company or corporation so owning and operating said railway engine and railroad, and in whose service the engineman and fireman are at the time engaged, is not liable for any injury or death inflicted upon either said engineman or fireman by reason of any negligent or wrongful act upon the part of the other; and that if plaintiffs' intestate received the injuries complained of as a result of the negligent management and operation of the engine by the engineer the defendant railway company is not liable therefor."

In due time and in proper form, the railway company, a foreign corporation, filed its petition, accompanied by bond, and moved the court to transfer the case to the federal court, upon the ground stated in the removal petition that the joinder of the resident engineer was fraudulent, and for the purpose of depriving the non-resident defendant of its right to have the action removed. This motion was overruled, and afterwards the defendants filed separate answers, traversing the averments of the petition and pleading contributory negligence. The railway company also pleaded that, as under the laws of Tennessee the engineer and fireman were fellow servants, it was not liable if the injury to the fireman was caused by the negligence of the engineer.

Upon the conclusion of the evidence for plaintiffs, the court, on motion of the engineer, instructed the jury to find a verdict in his favor. Immediately upon this motion being sustained, counsel for the railway company again offered to file the petition and bond for removal that had been theretofore filed and made a part of the record, and moved the court to enter an order removing the case to the Circuit Court of the United States for the Eastern District of Kentucky, and this motion, over the objection

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of counsel for the plaintiffs, was sustained. This appeal is prosecuted from the order of the court directing the jury to find a verdict in favor of Hudson, the engineer, and from the order removing the action against the railway company to the United States Circuit Court.

The accident happened in this way: The engine on which Haynes was firing was the second engine in a double-header freight train going south from Somerset. The train left Somerset at 9:30 in the morning, and a little after 12 o'clock that night, and while the train was running, the crown sheet blew out, and the escaping steam and water scalded the fireman so badly that he died soon afterwards. The crown sheet is a large sheet of iron that covers the fire box of the engine; the top of it being covered with hot or boiling water. In other words, on the lower side of the crown sheet is the fire, and on top of the crown sheet is the water. The blowing out of the crown sheet, as it is called, may be caused by not having enough water in the boiler, or by having too much steam. If there is not enough water in the boiler, the fire will burn the crown sheet, and thus let the water and steam on top of it down in the fire box; and if there is too much steam it will crack or break the crown sheet, producing the same effect. At the moment of the accident, the fireman opened the fire box door; and just as he opened it the crown sheet burst and the hot steam and water poured out of the door. The engineer testified that he was informed that the crown sheet of this engine had been burned and injured some two or three months before this trip, and that it was a rule of the company that engineers should go to the board and see the engine that was marked for them to take out, and then go and get the engine ready, but that he did not remember whether the fact that he had heard that the crown sheet had been burned before that was in his mind or not. That, as directed by the orders, he got the engine ready and started out with it.

He said that he could not see the steam gauge on his side of the engine, as while he was on the trip one of the window panes fell out of the cab window on his side, and the wind blowing in prevented him from having any light that would enable him to see the steam gauge on his side, and that just a moment before the accident he went to the fireman's side to get a drink of water, and as he came back to his side he looked at the steam gauge on the fireman's side, and, observing that it registered 220 pounds, said to the fireman, "You are carrying too much steam in the boiler." Thereupon the fireman opened the fire box door, and the explosion occurred. That there were two safety valves on the engine, both of them adjusted at 180 pounds, and both were blowing off when he told the fireman he was carrying too much steam. That, while under the rules the engineer was in charge of the engine, yet it was the duty of the fireman to keep steam

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up, and the duty of both of them to see that a sufficient quantity of water was in the boiler, and not too much steam. That neither the fireman nor the engineer had anything to do with the arrangement of the safety valves. That even with a properly equipped steam guage adjusted to let off steam at 180 pounds the steam may go higher, if the fire is kept up. That the boiler was full of water. That in a good many engines there was a soft metal plug in the crown sheet, put there so that if the crown sheet got too hot this plug would melt out, and thereby prevent an explosion, but that modern engines were built without these plugs. He said that the engine was fired up when delivered to him, but that it was his duty to inspect the crown sheet, and that he did so before starting. It is further shown by the engineer that the company's rules required the boilers of the engines to be washed out every 12 days, but that he did not know whether this boiler had been washed regularly or not. He said that he made a careful examination of the engine before starting from Somerset, and found everything in good condition. That there were no defects in the engine that he knew of, and that they had no trouble until the explosion of the crown sheet occurred.

The road foreman of engines, whose duty it was to inspect engines, was introduced as a witness for the plaintiff, and testified in substance that some month or so before this accident the crown sheet on this engine had been burned, but that it was repaired and in good condition when it went out on this trip.

Neil Silvers, who had formerly been an engineer on this road, was introduced as a witness, and said that if the crown sheet of this engine had been burned out and repaired it would not be as substantial as it was before.

In short, the evidence showed this state of facts: That the company directs the engineer what engine to take out, and it is the duty of the engineer to inspect the engine, and see that it is equipped with all the necessary implements and machinery and in good condition. That Hudson, the engineer, did this before starting out with this engine, and, so far as he knew or could tell, the engine was in good condition when he left Somerset with it. That there were two steam gauges on this engine, one on the engineer's side and one on the fireman's side, and it was the duty of both the engineer and fireman to notice these steam gauges, and see that the proper amount of steam was kept up and a sufficient quantity of water kept in the boiler. That some time after leaving Somerset a pane in the cab window blew out, or was shaken out, leaving the space open, and the wind coming in this opening prevented the lamp at the steam gauge from being lighted on the engineer's side. That the fireman knew of this condition, and was warned by the engineer to keep his eye on the steam gauge on his side. That there was plenty of water in the boiler at the time the accident occurred, and two steam gauges

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adjusted to blow off steam at 180 pounds were popping off steam. That immediately before the accident the engineer walked across to the fireman's side of the engine to get a drink of water, and discovered that the steam gauge on the fireman's side showed that the engine was carrying 220 pounds of steam, whereupon he told the fireman that the engine had too much steam, and walked back to his side of the cab. That just as he reached his side of the cab the fireman opened the fire box door—for what purpose the evidence does not disclose, but presumably to allow the engine to cool off—and when he opened the fire box door the explosion occurred, due to the "burning out," as it is called, of the crown sheet. That this accident could have been caused by not enough water or too much steam; but, as uncontradicted evidence is that the boiler was full of water, the explosion must have been due to the excessive amount of steam the engine was carrying. It is further shown that the engine, with the exception of the window pane falling out, was in good working order during the whole trip, until the explosion occurred.

[1] Under this state of facts, we think it plain that the court properly instructed the jury to return a verdict for the engineer. There is absolutely no evidence of any negligence on the part of the engineer. If it was his duty to inspect the engine before he took it out, for the purpose of ascertaining whether or not it was in good condition, he testifies without contradiction that he did this. If it was his duty to see that an excessive quantity of steam was not carried, this duty was also enjoined on the fireman; and, as the fireman could see the steam gauge on his side, and the engineer could not see the one on his side, it is clear that as between the engineer and fireman the engineer was not negligent in this respect. If the accident was due to negligence at all, a question we do not express any opinion concerning, it was the negligence of the company in sending out the engine with a defective crown sheet, although the weight of the evidence tends to show that the accident was caused by the excessive steam in the boiler, and not any defect in the crown sheet.

[2, 3] The record does not present, as insisted by counsel, any question of misfeasance or nonfeasance on the part of the engineer. "Misfeasance is the performance of an act, which might lawfully be done, in an improper manner, by which another person receives an injury," while "nonfeasance is the nonperformance of some act which ought to be performed." Bouvier's Law Dictionary. If the accident had been caused by either misfeasance or nonfeasance amounting to a breach of duty on the part of the engineer, we would hold him liable. In some jurisdictions the servant is not held accountable to third persons for nonfeasance, but is for misfeasance; but a contrary rule, and one that is in accord with the weight of modern authority, prevails in this state. We do not recognize any distinction, so far as the ac-

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countability of the servant is concerned, between acts of misfeasance and nonfeasance. *Ward v. Pullman Co.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343; *C. & O. Ry. Co. v. Banks*, 144 Ky. 137, 137 S. W. 1066; *Illinois Central R. Co. v. Coley*, 121 Ky. 385, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370. If a servant performs in an unlawful manner an act that results in injury to a third person, or if a servant fails to observe a duty that he owes to third persons, and injury results from his fault of commission or omission, he is liable in damages. There is no reason for making a distinction between acts of commission and omission, when each involves a breach of duty. The servant is not personally liable in either case because the breach of duty was committed by him while acting in the capacity of servant, but responsibility attaches to him as an individual wrongdoer, without respect to the position in which he acts, or the relation he bears to some other person. It is the fact that the servant is guilty of a wrongful or negligent act amounting to a breach of duty that he owes to the injured person that makes him liable.

[4] It is not at all material whether his wrongful or negligent act is committed in an affirmative or willful manner, or results from mere nonattention to a duty that he owes to third persons, and that it is entirely within his power to perform or omit to perform. There are innumerable situations and conditions presented in the everyday affairs of life that make it the duty of persons to so act as not to harm others, and when any person, whatever his position or relation in life may be, fails, from negligence, inattention, or willfulness, to perform the duty imposed he will be liable. *Ellis v. Southern Railway Co.*, 72 S. C. 465, 52 S. E. 228, 2 L. R. A. (N. S.) 378. For illustration, if it was the exclusive duty of the engineer under the circumstances shown by the record to observe and control the amount of steam carried, or the condition of the water in the boiler, and the fireman had no duty to perform in respect to these matters, except as he might be directed by the engineer, we would say that the engineer was liable in this action, and this without reference to whether the breach of duty committed by him in this respect was one of misfeasance or nonfeasance.

[5] But when it is sought to hold the servant liable because he works with defective or unsafe machinery or implements furnished to him by the master, and injury results, due to the defects, an entirely different question is presented. It is neither the province nor the duty of the servant to dictate to the master the character of tools, implements, or machinery that he shall be provided with. The servant has usually no right of selection or voice in the kind or quality of machinery or implements he must work with. These things are furnished by the master, and if they are defective or unsafe the liability attaches to the master, and not to the servant. It would be a most unreasonable doctrine to

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hold a person responsible for defects in machinery that he was merely employed to work with, under the direction of a superior, who possessed the exclusive right to furnish the tools or machinery needed by him in the performance of his duties. To hold the servant responsible for the delinquency or wrongdoing of the master would be to put upon him responsibilities that he did not assume in accepting the employment, and charge him with conduct that the conditions of employment placed beyond his power of control. We therefore think it is clear that when, as in this case, a railroad company furnishes an engine to an engineer, and directs him to take it out, that the engineer is not personally liable in an action for damages, because injuries are occasioned by some defect in the engine. Being of the opinion that the trial court properly directed a verdict in favor of the engineer, the next question is, Was it error to sustain the motion of counsel for the railway company to transfer the case to the federal court?

[6] Whatever may be the rule in other jurisdictions, it is well established in this that when it appears during the trial of a case against a resident and nonresident defendant that there is a failure of proof against the resident defendant, the nonresident defendant may, when this condition arises, renew a motion to transfer on the ground of fraudulent joinder previously and in due time made. *Dudley v. Illinois Central R. Co.*, 127 Ky. 221, 96 S. W. 835, 29 Ky. Law Rep. 1029, 13 L. R. A. (N. S.) 1186, 128 Am. St. Rep. 335; *Illinois Central R. Co. v. Coley*, 121 Ky. 385, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; *C. & O. Ry. Co. v. Banks*, 144 Ky. 137, 137 S. W. 1066; *Underwood v. Illinois Central R. Co.*, 103 S. W. 322, 31 Ky. Law Rep. 595; *Ward v. Pullman Co.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343. We did not hold in these cases nor do we now lay it down as a rule of practice, that the decision of the trial court that the plaintiff has failed to make out a case against the resident defendant conclusively determines the right of the nonresident defendant to removal. The ruling of the trial court upon the question of removal is subject to review by this court, and if upon an inspection of the record we should be of the opinion that the trial court erred in determining that no case was made out against the resident defendant, we would hold that it was error to transfer the case. We would also hold that the order for removal was improper, if it appeared from the record that when the petition was filed the plaintiff had evidence reasonably sufficient to make out a case against the resident defendant, although he might for any reason be unable to produce it at the trial. But when, as in the case before us, we are satisfied from a consideration of the whole record that the plaintiff totally failed to make out a case against the resident defendant, and there is no showing that when the action was filed he could have made out a bet-

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ter one, it follows from the ruling in the cases before mentioned that we must agree with the trial court that the nonresident defendant was entitled to remove the action.

The practice we have adopted in this particular is vigorously assailed by counsel for appellant, as it has been by counsel in other cases presenting the same question. The argument is again pressed, as it has often been before, that the right of removal is to be determined by the averments of the petition filed by the plaintiff, and that nothing that may subsequently arise in the case can deprive the state court of jurisdiction, if the petition states a good joint cause of action against the resident and nonresident defendants. In other words, the insistence is that, although it may appear during the trial that the plaintiff has utterly failed to make out a case against the resident defendant, and it does not appear that when the petition was filed he had reason to believe he could make out a case, that, notwithstanding these admitted facts, if the petition states a good joint and several cause of action, the court is precluded from any further inquiry into the matter. In support of this view, our attention is called to some cases decided by the United States Supreme Court, and by the federal courts, which it is claimed sustain the contention of counsel, and are in conflict with the rule of practice we have adopted.

[7] It is scarcely necessary to observe that, if it were true that the United States Supreme Court had so held, we would not hesitate to retract what we have said upon this point, first, because we have no disposition to deprive our state courts of jurisdiction, to which they are entitled; and, second, because in questions like this the Supreme Court is the final authority, and we would feel bound by its decisions. But we do not think the cases cited by counsel announce a different rule on the point under consideration from that held by this court. In *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, an action was brought in a state court against a resident railroad company and the receivers of another railroad company, who were appointed by the Circuit Court of the United States. In due time the receivers filed a petition for removal, on the ground of adverse citizenship, setting up that the resident railway company was fraudulently made a party for the sole purpose of preventing a removal of the cause. An order of removal was entered by the state court, and the cause sent to the Circuit Court of the United States, and thereafter that court remanded it to the state court. After the testimony was in, the court instructed the jury to return a verdict for the resident railroad company, and thereupon the receivers renewed their motion for removal, which was overruled. The case then proceeded to trial against the receivers, and judgment was rendered, which was afterwards affirmed by the Supreme Court of Minnesota. A writ of error was taken from that court

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to the Supreme Court of the United States, and in the course of the opinion that court said the ruling of the trial court "was a ruling on the merits and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the case then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried. As we have said, the contention that the railway company was fraudulently joined as a defendant had been disposed of by the Circuit Court. But, assuming, without deciding, that that contention could have been properly renewed, under the circumstances, it is sufficient to say that the record before us does not sustain it."

In *Kansas City Suburban Ry. Co. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76, the suit was against a resident and nonresident defendant. A motion to remove was made by the nonresident, upon grounds that did not involve the question of fraudulent joinder. The motion being denied, the nonresident defendant filed a transcript of the record in the Circuit Court of the United States, in which court a motion to remand was sustained. Afterwards, upon the trial in the state court, a verdict was directed by the trial court in favor of the resident defendant, and thereupon the nonresident defendant offered a second petition for removal, charging a fraudulent joinder. When this petition was filed, the plaintiff without objection filed an affidavit denying that the joinder was fraudulent, and averring that when the petition was filed he believed in good faith he had, and in fact did have, a joint cause of action against both of the defendants, but that on account of the inability to obtain witnesses he was unable to present the state of facts he had in his possession when the petition was filed. The application for removal was overruled, and judgment being rendered against the nonresident it appealed. In holding that the trial court properly refused to remove the case, the court said: "The first petition in terms raised no issue of fraudulent joinder, but the second petition did. Was that issue seasonably raised, and, if so, ought the case to have been removed? The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after the plaintiff had introduced his evidence, notwithstanding the averments in the first petition. But, apart from this, the averments of fraud were specifically denied, and, so far as this record discloses, the petitioner who had the affirmative of the issue failed to make out his case. * * * Nor was the evidence introduced on plaintiff's behalf and demurred to made part of the record, and the bare fact that the trial court held it insufficient to justify a verdict against the

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terminal company was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown the plaintiff had reasonable ground for a bona fide belief in the liability of both defendants. In these circumstances the case comes within *Whitcomb v. Smithson*, and the judgment must be affirmed."

In *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, Wecker brought an action in the state court against the National Enameling Company, a nonresident corporation, and Schenck and Wettengel, individuals and residents of the state in which the action was brought. In due time the corporation filed its removal petition, charging a fraudulent joinder of the resident defendants. An order of removal was made, and the motion to remand overruled; thereupon the plaintiff prosecuted an appeal from the United States Circuit Court to the Supreme Court of the United States. No evidence was heard in the Circuit Court, but affidavits were filed in support of the averments of the removal petition, and also controverting affidavits by the plaintiff. Upon these affidavits, the Circuit Court reached the conclusion that, considered with the complaint, they showed conclusively an attempt to defeat the jurisdiction of the federal court. In affirming the judgment of the Circuit Court, the Supreme Court said: "While the plaintiff in good faith may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal court should not sanction devices intended to prevent a removal to federal courts where one has that right, and should be equally as vigilant to protect the right to proceed in the federal court as to permit the state courts in proper cases to retain their own jurisdiction."

These cases, especially the *Wecker Case*, decided subsequently to the *Whitcomb Case*, we think sustain our practice, and it is clear that the *Whitcomb Case* is not in conflict with it; nor have we been furnished with any authority that is. It will be conceded that if the joinder was fraudulent, and not in good faith, the case should be transferred; but counsel insists that the question of whether or not the joinder is fraudulent is to be determined alone by the averments of the petition. To this we do not agree. The attorney who files a petition may believe in good faith that he has a joint cause of action, and be entirely free from any purpose to practice a fraud, and yet as a matter of law he might be altogether wrong in his opinion. Whether the joinder is legally fraudulent or in good faith is to be determined by the facts appearing in the record, and not solely by the averments of the petition. The pleader is presumed to know when he files his petition whether or not he can make out a case against the resident defendant; and if, at the time he files his pe-

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tition he has evidence or witnesses who will sustain his complaint against the resident defendant, the fact that circumstances may deprive him of this evidence on the trial will not justify removal, but when the situation at the time of the trial is precisely the same as it was when the petition was filed, and when the plaintiff is in possession of and introduces all the evidence that he had when the petition was filed, and totally fails to make out a case against the resident defendant, it cannot in fairness be said that the petition in good faith stated a cause of action against the resident defendant. Good faith, when put in issue, is a question of fact to be determined by the record, and not by the words the pleader may use in stating his cause of action. While it will be presumed, until the contrary appears, that the plaintiff in good faith believed he had a cause of action against the resident defendant, this presumption must give way when it is conclusively shown on the trial that no case has been, or could at any stage of the proceeding have been, made out against the resident defendant. It is manifest that any other rule would enable the plaintiff to defeat in every case like this the act of Congress allowing a removal to a nonresident defendant, by merely joining a resident defendant and stating a good joint cause of action against each defendant. We cannot give our approval to a practice like this.

Wherefore the judgment is affirmed.

DARDANELLE & R. RY. CO. v. BRIGHAM.

(Supreme Court of Arkansas, Feb. 27, 1911.)

[135 S. W. Rep. 869.]

Master and Servant—Injuries—Negligence.—Defendant railroad company, whose tracks connected with the tracks of another road by a "Y," had been permitted to switch in the yards and over the main line of the other company for 15 years, and had been accustomed to continue switching in the yards while the local freight train of the other road was at the station and in the yard; defendant's train only being bound to get off the main track and out of the way of the trains of the other road when necessary. Held, that the engineer of one of defendant's trains was not negligent in using the main track of the other company for switching while its local freight train was in the yard, so as to make defendant liable for the death of an employee by the collision of its train while switching on the main track with the local freight train of the other company.

Master and Servant—Injuries—Negligence.—If the engineer of defendant's train discovered the approaching train of the other company in time to have avoided a collision by giving a stop signal to

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the other engine, or warn his fireman, who was then shoveling coal, to enable him to escape, his failure to do either would be negligence, making defendant liable for the fireman's death in the resulting collision.

Master and Servant—Injuries—Actions—Jury Questions.—In an action for the death of a fireman by the collision of his engine with an engine belonging to another road on the tracks of which his engine was switching, evidence held to sustain a finding that an earlier signal by decedent's engineer might have attracted the attention of the engineer on the other train.

Master and Servant—Master's Liability—Negligence of Other Company.—The S. Railroad Company executed a contract with defendant company, which granted defendant the right to connect its tracks with the S. Company's tracks, and operate its cars over the latter's tracks between certain points in its yards, under the supervision of the officers of the S. Company, so as not to interfere with its business, gave defendant the joint use of the station facilities, and provided that the S. Company's agents should attend to defendant's business, during which time they should be considered defendant's agents, but that defendant should perform, free of charge, all switching service between the two roads, and that the S. Company should have the free use of the "Y" connecting defendant's tracks with its own tracks, provided it did not interfere with defendant's business. Held, that defendant, when using the S. Company's tracks under the agreement, was not liable for injuries to its trainmen caused by the S. Company's negligence.

Release—Covenant Not to Sue.—Plaintiff sued defendant railroad company and the S. Railroad Company for the death of her intestate, employed by defendant as fireman, in a collision between his train and an engine of the S. Company, while his train was switching on the S. Company's tracks under an agreement between the two companies, charging concurrent negligence by the trainmen of the two trains. Afterwards plaintiff and the S. Company executed a contract by which it admitted its negligence and liability, and agreed that if plaintiff would dismiss as to it, and fail to recover from defendant, it would pay plaintiff \$7,000, and if the recovery against defendant was less than \$10,000 it would pay plaintiff a sum sufficient to aggregate that sum; and further provided that the S. Company would at once pay plaintiff \$1,000 to be credited upon the total amount paid by it under the contract. Held, that the contract was merely a covenant by plaintiff not to sue the S. Company, and was not a release of the claim for death.

Appeal from Circuit Court, Pape County; Hugh Basham, Judge.

Action by Lizzie Brigham, administratrix, against the Dardanelle & Russellville Railway Company. From a judgment for

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plaintiff, defendant appeals. Reversed and remanded for a new trial.

J. W. & J. W. House, Jr., for appellant.

J. T. Bullock and R. B. Wilson, for appellee.

McCULLOCH, C. J. Appellee's intestate, J. L. Brigham, while working for appellant as a locomotive fireman, was killed in a collision of his engine with one of the St. Louis, Iron Mountain & Southern Railway Company on the main line of the latter's track at Russellville, Ark. Appellant operates a short line of railroad between Russellville, a station on the St. Louis, Iron Mountain & Southern Railway, and Dardanelle. Its railroad is connected with the Iron Mountain line with a "Y" a short distance east of the station at Russellville. The west leg of the "Y" runs parallel with the main line of the Iron Mountain for some distance in the direction of the station, and connects with the main line of that road about 1,200 feet east of the station. All of the side tracks and switches there are owned by the St. Louis, Iron Mountain & Southern Railway Company, and constitute a part of its yardage. One is a house track which runs off from the south side of the main line from a point between the depot and appellant's connection with the main line to the freight house. The other side tracks are on the north side of the main line of the Iron Mountain Road, the first one being a passing track, and three others known in their order as numbers 1, 2, and 3. There is a connecting switch between the main track and the passing track a short distance west of the station, and the only other connection with the main track and the other tracks on the north side thereof is about a half mile east of the station. The result of this is that in switching cars from the track of appellant's road to the side tracks on the north side of the Iron Mountain main line track, or vice versa, it is necessary to travel along the Iron Mountain main track a distance of something like a fourth of a mile. Appellant's road has no connection, except with the St. Louis, Iron Mountain & Southern, and necessarily receives all of its through freight from that road.

On May 2, 1904, the two companies (appellant and the St. Louis, Iron Mountain & Southern Ry. Co.) entered into a written contract covering traffic arrangements between them, in consideration of certain mutual undertakings and the payment by appellant to the other company of a monthly rental of \$35, whereby appellant was required to do the switching and was allowed to use the tracks and station of the other company. Two clauses of the contract which are material read as follows:

"(5) The parties of the first part hereby grant to the party of the second part the right to connect the west leg of the 'Y' at Russellville with the track of the said parties of the first part at

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the point indicated by the letter 'G' on the blue print map hereto attached, and to operate its trains and cars with its own motive power over, along and upon the track of said parties of the first part, between the point indicated by the letters 'G' and 'E' upon the blue print map hereto attached, and over and along and upon the track proposed to be constructed by the party of the second part between the points indicated by the letters 'E' and 'F' upon said blue print map, as hereinbefore provided; but the party of the second part shall only operate its trains, engines and cars upon the right of way of the parties of the first part under the direction and supervision of the proper officer of said parties of the first part, and in such manner as not to interfere with the business of said parties of the first part, or either of them.

"(6) The parties of the first part further grant said party of the second part the right to joint use of station facilities at Russellville, Arkansas, and said parties of the first part will through their servants and agents, at the station at Russellville, attend to the business of the party of the second part at that point, including telephone service, but while so attending to the business of the party of the second part, such servants and agents shall be considered to be the sole servants and agents of said party of the second part; but it is expressly understood and agreed that the party of the second part shall perform all switching service between the Dardanelle & Russellville Railway Company and the Little Rock & Ft. Smith Railway free of charge, and that the parties of the first part shall have free use of the 'Y' at Russellville, but in such manner as not to interfere with the business of the second party."

Appellant had been allowed the use of the tracks under a similar contract for a number of years before the occasion in question, making in all about 15 years that the tracks had been so used. The train with which Brigham's engine collided was a local freight train, which reached Russellville from the west somewhere about noon or shortly thereafter. The collision occurred at 2:15 p. m. on January 12, 1909. Appellant's engine, with Brigham as fireman and Charles Shuttle as engineer, was switching at the time, and it became necessary to go over on one of the tracks north of the main line after four cars to weigh them. After getting these cars the engine was run down to the west end of the yards to get a couple of coal cars on the passing track, and after getting them it was backed down to the east end of the yards. About this time the engine of the local freight train, which was then at the station, headed towards the east, came down the main track near the end of the passing track to drop a car, where appellant's engine was then standing waiting on the passing track. After dropping the car the Iron Mountain engine backed down the main line toward the station, and appellant's engine backed out onto the main track and

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headed down the track, following the other engine; the two facing each other. In doing this, appellant's engine was making its way to the connecting switch of its line with the main track of the Iron Mountain. It passed this switch far enough for it to be opened, and the brakeman dropped off to open the switch. About this time the Iron Mountain engine, having been connected with the train which had been left standing near the station, gave a start signal of two blasts of the whistle and started down the track toward appellant's engine, which was then backing through the switch onto its own line. Shuttle, the engineer, testified that he thought the other engine was coming down the track for the purpose of backing in on the house track, and that as soon as it approached close enough for him to decide that it was not coming for that purpose he blew a stop whistle, to which no attention was paid, and that he blew a second time. The Iron Mountain train came on and collided with the appellant's engine, and Brigham's death resulted therefrom.

Appellee first instituted an action against the Iron Mountain to recover the damages sustained, alleging that the collision was caused by the negligent act of the engineer of that company. The complaint alleged that Shuttle, by a blast from his engine whistle, signaled the local freight train to stop, but that the servants in charge of the local freight train refused to give any heed to the said signal, and that the same was repeated, and that again the servants in charge of the local freight train refused to recognize or in any way give heed to said signal, and that while appellant's train was backing on to its track, and before it could get its train completely on its track and rethrow the switch, the engineer in charge of the local freight train negligently, recklessly, wantonly, willfully, and without any regard for the safety of persons or property on either of said trains, ran the local freight train onto and collided with appellant's train. On motion of defendant, appellant was made a party defendant, and appellee, after appellant was made a party, amended her complaint by alleging that the collision occurred by reason of the concurring negligence of the engineer and conductor of appellant's train with the trainmen of the other defendant, the St. Louis, Iron Mountain & Southern Ry. Co.

Subsequently, the latter company entered into a written contract with appellee, whereby it conceded its negligence in the particular named, and its liability for the damage, and agreed, in substance, that, if appellee would prosecute her suit solely against appellant and dismiss the action against the Iron Mountain Company, and that if appellee failed to recover damages from appellant, the other company would within 30 days from the final result of the trial of the cause pay to appellee the sum of \$7,500 and the costs of the action; and that, in the event of

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a recovery from appellant of less than \$10,000, said company would pay to appellee a sum sufficient to amount in the aggregate to \$10,000. It was further agreed in the contract that the Iron Mountain Company should at once pay to appellee the sum of \$1,000, which was to be credited on the total amount to be paid under the contract, should there be any further liability thereon. Thereupon the action against the Iron Mountain was dismissed by appellee, and the action was prosecuted alone against appellant. The trial resulted in a verdict against appellant, the damages being assessed at \$10,000; and the court ordered the \$1,000 paid by the Iron Mountain Company to be credited thereon.

Appellant, in addition to denying the allegations of negligence on the part of its servants, pleaded the contract between appellee and the Iron Mountain Company as a satisfaction of the claim for damages. The court submitted the case to the jury on instructions requested by appellee, to the effect that if appellant's engine was on the main track of the Iron Mountain in violation of the rules of that company, or in violation of the contract between the two companies, that appellant would be liable for the injury, even if the servants of the other company were negligent in running the engine into appellant's engine. We think these instructions were erroneous, and that the case should not have been submitted to the jury on that theory. It is conceded that the servants of the Iron Mountain were guilty of negligence which caused the injury, and that that company is liable for the damages. It is clear that according to the undisputed evidence in the case, even that of the engineer of the Iron Mountain engine, that that company is responsible for the injury.

It is true that the contract between the two companies specified that appellant, in doing the switching in the yards, must do so "in such manner as not to interfere with the business" of the other company. There is also a rule of the Iron Mountain Company which made appellant's train an inferior one, in the sense that it was the duty of the trainmen to keep out of the way of superior trains. Whatever may be construed to be the effect of the contract and the rule referred to, the undisputed evidence in the case shows that appellant had been permitted to do switching in the yards and over the main line of the other road for 15 years precisely in the manner in which it was being done at the time this collision occurred. The witnesses all state, without contradiction, that the local freight train of the Iron Mountain Road frequently remained at the station and in the yards several hours, and that it was an unbroken custom for appellant's train to continue its switching during that time, using the main track for that purpose. The only duty recognized

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was that it should get out of the way of the Iron Mountain trains when necessary.

In doing the switching in accordance with the unbroken custom of many years' standing, appellant's trainmen were not guilty of negligence merely in going in on the main track. If, in the discharge of their duty while on that track, they failed to keep out of the way of the Iron Mountain trains, then they are chargeable with negligence, but not merely on account of being on the track where, according to custom, they had the right to be. The Iron Mountain trainmen were bound to have known that appellant's engine was on the main track, for the switching was being done at the time that the Iron Mountain engine was backed down the main line for the purpose of coupling on to the train; appellant's engine following it down the track and stopping only a few hundred yards in front of it and in full view. We say therefore that there was no negligence in being on the main track under those circumstances, and the court was in error in submitting this to the jury as an act of concurring negligence. For this error the judgment must be reversed.

The only theory upon which the appellee could recover damages of appellant is the one that the engineer, Shuttle, was guilty of negligence in failing to give a stop signal as soon as the Iron Mountain engine started down the track towards him. The fireman was at that time, according to some of the testimony, at work shoveling coal and did not see the approaching engine. The duty, therefore, of avoiding the injury devolved entirely upon the engineer, and if he discovered the approaching engine in time to have avoided a collision, or in time to have warned the fireman, so that he could escape before the collision, and failed in his duty. Then appellant is responsible for his negligence in that respect.

It appears from the great preponderance of the evidence that as soon as the engineer realized that the other engine was not coming to the house track he gave a stop signal, and did all that he could reasonably do to avoid a collision. Still the evidence shows that when the Iron Mountain engine started it gave a start signal, which meant that it was about to resume its journey, and there was room to find that appellant's engineer should have taken cognizance of the fact that there was danger of a collision, and that the trainmen on the other engine were unconscious of his presence, and should have given a stop signal earlier than he did. The evidence tends to show that the engineer on the Iron Mountain engine was reading his orders, and did not look to see the other engine ahead of him. If this be true, an earlier signal might have attracted his attention; at least the jury might have so found.

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It is contended that, on account of the joint use of the track by the two companies under the aforesaid contract, each is liable for damages caused by negligence of the other. We hold that appellant, when its own servants are free from any charge of negligence, is not liable for damages caused by negligence of the other company. *St. L. S. W. Ry. Co. v. Heintz*, 82 Ark. 459, 102 S. W. 221. It may be different where a passenger is injured.

Learned counsel for appellant insist with much earnestness that the effect of the contract entered into by appellee with the Iron Mountain Road was a satisfaction of the claim for damages, even conceding that appellant and the other company were jointly liable; and that the contract operated as a release of appellant from liability. We deem it proper to dispose of that question in view of another trial. The contract was, as we construe it, merely a covenant not to sue the other company, and did not operate as a satisfaction of the claim. *Texarkana Telephone Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257. Counsel cite many cases bearing on this question, but without reviewing them we entertain no doubt that such is the effect of the contract, and appellant can claim nothing under it.

For the error in instructing the jury as heretofore indicated, the judgment is reversed, and the cause is remanded for a new trial.

CINCINNATI, N. O. & T. P. R. Co. *et al.* v. MAYFIELD'S ADM'R.

(Court of Appeals of Kentucky, Nov. 10, 1911.)

[140 S. W. Rep. 310.]

Appeal and Error—Review—Tracks—Conclusiveness.—Where the evidence as to whether plaintiff's intestate went to sleep upon defendant's tracks was sharply conflicting, a verdict for plaintiff cannot be set aside as palpably against the evidence.

Master and Servant—Injuries to Servant—Railroad Employees.*—A railroad company should not move its trains through a yard in which employees were constantly moving, and which was frequently used by them in going to and from their place of work, without a reasonable signal and a reasonable lookout.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies, as employers, with respect to injuries to employees, other than those engaged in coupling and uncoupling cars, sustained while they are on railroad tracks, and caused by the running of trains, locomotives, or street cars, see first foot-note of *Smith v. Southern Pac. Co.* (Ore.), 39 R. R. R. 600, 62 Am. & Eng. R. Cas., N. S., 600.

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Appeal from Circuit Court, Boyle County.

Action by the administrator of the estate of Norman Mayfield, deceased, against the Cincinnati, New Orleans & Texas Pacific Railroad Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. H. Rodes, John Galvin, and George E. Stone, for appellants.

Robt. Harding, for appellee.

HOBSON, C. J. On July 30, 1909, between 11 p. m. and 12 p. m., Norman Mayfield was killed in the yards of the Cincinnati, New Orleans & Texas Pacific Railroad Company at Danville, Ky. He was in the service of the company firing an engine called a clam shell, and used in handling coal. His father, George W. Mayfield, operated the engine. Shortly before midnight, he, with the permission of his father, left the clam shell to go to a restaurant and get a lunch. In going to the restaurant he went across the railroad yard. At this time a live engine was backing in on one of the tracks with a dead engine in front of it; that is, both engines were backing, but the dead engine was backing in front of the live engine. Ed. Weddle, the engineer in charge of the live engine, was in the cab of that engine, and W. L. Hudson, a brakeman, was in front of the tender of the dead engine with a lantern in his hand; that is, he was on the end of the tender that was in front as the engine was backing along. As they were proceeding in this way, the front wheels of the front trucks ran over Norman Mayfield's legs, injuring him, so that he died soon thereafter. This action was brought by his personal representative to recover for his death against the railroad company, Weddle, the engineer, and Hudson, the brakeman. The proof for the plaintiff on the trial showed that young Mayfield left the clam shell, and within from two to five minutes thereafter his father was called by some one who told him that his son had been hurt. He went at once to the place, and found his son about 16 feet back from the front of the tender. The proof for the plaintiff also showed that the place in the yard where the injury occurred was one much used by persons passing about, that there were no lights on either engine, and that no bell was rung or signal given of their movement. On this evidence the court instructed the jury peremptorily to find for Hudson, but refused to instruct the jury peremptorily to find for the other two defendants. The defendants then introduced their evidence. Hudson testified that he was standing at the front of tender with a lantern in his hand, and when he got within eight feet of Norman Mayfield he discovered him sitting on the track with his head bent over his knees; that he signaled the engineer to stop, and jumped from the tender and

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tried to pull Mayfield off the track, but before he could get him off part of his clothing was caught by the tender, and the front wheels passed over his legs before the engine could be stopped. Weddle confirmed the testimony of Hudson, but he and Hudson both state that it was a dark night, and that the engine bell was not ringing; that no signal of the approach of the engine was given, except that Weddle whistled when they started in on this track, five or six hundred feet away from the point where Mayfield was struck. They also agreed that there was no light about the dead engine, except the lantern held by Hudson, and the proof is not clear that this light was so held as to be seen by one in front. The case was submitted to a jury under this evidence, and they returned a verdict in favor of the plaintiff against the railroad company and Weddle in the sum of \$5,000. The court entered judgment on the verdict and refused a new trial. The defendants appeal.

[1] It is earnestly insisted that Mayfield was asleep upon the railroad track, and there is much in the evidence to sustain this view. But this matter was clearly submitted to the jury by the instructions of the court. Instruction 7 given by the court is as follows: "The court instructs the jury that if they believe from the evidence that Norman Mayfield voluntarily went upon the track of the defendant company, and sat down upon same and placed his head down upon his knees, and this was his position at the time he was run upon and injured by defendant company's engine, then he (the deceased, Norman Mayfield) was guilty of such contributory negligence as bars the plaintiff's right to recover, and they will find for the defendants, notwithstanding you may believe from the evidence that the defendants were guilty of negligence as stated in instruction No. 1." The finding of the jury for the plaintiff under this instruction is a finding by them that the injury did not occur as stated by Hudson. The credibility of the witnesses is for the jury, and we cannot disturb the verdict on the ground that it is palpably against the evidence.

[2] It is also insisted for the defendant that Mayfield had a safe way to go to the restaurant, and that he voluntarily went across the yard, incurring a danger that he need not have incurred. But this matter was also aptly submitted to the jury by the instructions of the court, and we do not see that the defendants' substantial rights were prejudiced in any way as to this matter. The court did not err in refusing to instruct the jury peremptorily to find for the defendants. According to the evidence for the plaintiff, the place was one where the presence of persons might reasonably be expected. It is within the corporate limits of Danville, and employees were constantly moving about in this part of the yard. In a number of cases, we have held that cars should not be moved in such places without a reasonable

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signal of their approach, or without a reasonable lookout or light on them when it is dark. *Shelby v. C., N. O. & T. P. R. Co.*, 85 Ky. 224, 3 S. W. 157, 8 Ky. Law Rep. 928; *Conley v. C., N. O. & T. P. R. Co.*, 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602; *L. & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. 185, 13 Ky. Law Rep. 344; *Gunn v. Felton*, 108 Ky. 561, 57 S. W. 15, 22 Ky. Law Rep. 268; *L. & N. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122.

The court gave the jury this instruction: "(1) If you believe from the evidence that the track and place in the defendant's yard where Norman Mayfield was run over and injured was habitually and frequently used by the employees of the company in going to and from their place of work therein to their meals, and to the machine shop, with the knowledge and acquiescence of the defendant, and was a place where the presence of employees of the company was to be anticipated, and that deceased was going from his work to his midnight supper when struck, then it was the duty of the defendants when moving on that part of the track where he was injured to keep a lookout for employees using it as a footway, and to give reasonable signals and warning of the movements of its engines when approaching said place, and if you believe from the evidence that the defendant in charge of the company's two engines mentioned in evidence negligently failed to perform either or both of these duties in the movement of said engines, and that by reason thereof the plaintiff's intestate, Norman Mayfield, while so on the track at said place, was run upon and received injuries from which he died by said train, and that he was at the time using ordinary care for his own safety, then you will find a verdict for the plaintiff against the defendants, Cincinnati, New Orleans & Texas Pacific Railway Company and Ed. Weddle, and if you do not so believe from the evidence you will find for the defendant." The instruction conformed to the rule laid down in the case above referred to. There was sufficient evidence that the place where Mayfield was struck was habitually and frequently used by employees of the company in going to and from their place of work, and it was a place where the presence of persons should reasonably be anticipated.

Judgment affirmed.

MELLISH v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, Oct. 2, 1911.)

[132 N. W. Rep. 513.]

Master and Servant—Intersecting Railroad Crossings—Regulations—Statutes.—Comp. Laws, § 6232, empowering the railroad crossing board to safeguard crossings of intersecting railroads, and orders of the board and of the Railroad Commissioner requiring a railroad company crossing the tracks of another company to erect and maintain at the crossings an interlocking system, do not contemplate protection at the crossing against collisions of trains on the same track, whether near to or far from the crossing; and a company formed by the consolidation of the two companies owes no duty to an engineer to maintain the interlocking system to protect him against any other injuries than those due to collisions between trains on the intersecting tracks.

Master and Servant—Fellow Servants—Negligence.*—The negligent failure of a locomotive engineer to obey a rule of the company for the protection of trains operated on the same track at stations is, as to another engineer injured in a collision in consequence thereof, the negligence of a fellow servant.

Master and Servant—Regulation of Trains—Rules—Negligence.—A railroad company adopting a rule that the speed of trains approaching water tanks and fuel stations must be so reduced that it should not be possible to strike any train taking fuel or water, and when necessary a flagman must be sent out to protect a train occupying the main track at a station while taking fuel or water, was not guilty of actionable negligence in permitting its locomotives to take fuel and water, without providing for other warnings to approaching trains.

Master and Servant—Injury to Servant—Assumption of Risk.†—An engineer fully acquainted with the dangers attending the use of a signal system adopted by the railroad company assumes the risk thereof.

*For the authorities in this series on the question whether trainmen of different trains are fellow servants, see first paragraph of first foot-note of *Still v. San Francisco, etc., Ry. Co. (Cal.)*, 31 R. R. 680, 54 Am. & Eng. R. Cas., N. S., 680.

For the authorities in this series on the question what are, and are not, the nonassignable duties of a master, see first foot-note of *Hardy v. Chicago, etc., Ry. Co.*, 38 R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; first foot-note of *Furlong v. New York, etc., R. Co. (Conn.)*, 39 R. R. 233, 62 Am. & Eng. R. Cas., N. S., 233; last paragraph of last foot-note of *Long Pole Lumber Co. v. Gross (C. C. A.)*, 37 R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669.

†For the authorities in this series on the question whether a railroad employee assumes the risks of dangerous conditions merely because he has knowledge of their existence and location; see last

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Error to Circuit Court, Bay County; Chester L. Collins, Judge.

Action by Flora Mellish, as administratrix, against the Pere Marquette Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Argued before Ostrander, C. J., and Bird, Brooke, Blair, and Stone, J. J.

Bills, Streeter & Parker (*Weadock & Weadock* and *Weadock & Duffy*, of counsel), for appellant.

Floyd A. Wilson (*James H. Davitt* and *De Vere Hall*, of counsel), for appellee.

BLAIR, J. This action arises out of an accident which occurred at Baldwin, Lake county, Mich., on March 14, 1905, in which plaintiff's intestate, an engineer in the employ of defendant's predecessor, was instantly killed.

In 1889, the Flint & Pere Marquette Railroad ran from Ludington and Manistee to Saginaw, passing through Baldwin. The Chicago & West Michigan Railroad Company made application to cross the tracks of the Flint & Pere Marquette Railroad at grade, and, in July, 1889, the board of railroad crossings made an order that the crossing should be made at grade, and that an interlocking and derailing switch and signal appliance, to be thereafter approved by the Commissioner of Railroads before the same was adopted for use, be procured and erected by the Chicago & West Michigan Company, and thereafter efficiently maintained and operated at the joint and equal expense of both companies. This interlocking and derailing switch and signal appliance was duly installed and approved by an order of the Commissioner of Railroads on November 22, 1889. This order of approval was modified, at the request of both of the companies, by the Commissioner of Railroads on March 25, 1896; the wire connections of all distance signals being ordered dispensed with, and each of the distance signals disconnected from its lever and permanently fixed in a position indicating caution. From that time up to the time of the accident, there were no

foot-note of *Korah v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 493, 61 Am. & Eng. R. Cas., N. S., 493; first foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by servants, see first foot-note of *Chicago, etc., Ry. Co. v. Grubbs* (Ark.), 39 R. R. R. 595, 62 Am. & Eng. R. Cas., N. S., 595; fourth head-note of *Southern Ry. Co. v. Foster* (Va.), 39 R. R. R. 578, 62 Am. & Eng. R. Cas., N. S., 578; second paragraph of second foot-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669; foot-note of *Jackson v. Chicago, etc., R. Co.* (C. C. A.), 37 R. R. R. 307, 60 Am. & Eng. R. Cas., N. S., 307.

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other or further orders made regarding this crossing or the appliances thereat by the board of railroad crossings or the Commissioner of Railroads. The appliance so installed consisted of (a) derails, about 250 to 300 feet on each side of the crossing; (b) the home signal, about 50 feet outside the derails; (c) the four distance signals; the one at the west, the only one material to the issue in this case, being 2,064.9 feet from the crossing.

The two railroads mentioned were consolidated in 1900. The interlocker was taken out on June 25, 1903, without any order from, or authority of, the railroad crossing board or the Commissioner of Railroads. It was discontinued and done away with, and the home and distance semaphores and the derails were removed and taken out entirely, and an ordinary diamond crossing installed in its place. The defendant installed over the southwest corner of the diamond a target on a pole 20 to 25 feet high; such pole being about 9 feet from the center of each main line track. This target was operated by the target man in the tower. At first a T target with two red lights was placed on this pole, and later, on January 1, 1905, a two-bladed crossing signal was installed in place thereof, which, at the time of the accident, was operated at night by means of red and white lights; a red light indicating stop, that a train had no right to cross the diamond, and a white light indicating proceed, that a train had the right to cross. This light was 25 feet 4½ inches above the rail.

West of the diamond, 610.6 feet on the north side of the Ludington main line, is a coal dock, or hoist. Engines could take coal from the south side of this coal dock on the Ludington main line, or from the north side of the dock, when standing on the northwest wye, without going on the Ludington main line. On the south side of the Ludington division main line, 529.4 feet west from the crossing, was a standpipe 6 feet south of the south rail. There was also a standpipe on the Petoskey division south of the crossing. This was east of the Petoskey main line, and was situated between the main line and the side track, or wye. Petoskey division engines could obtain water at this standpipe on their own line without being on the Ludington main line.

After the coal dock was built, it was the general practice for Petoskey division engines to go over on the main line of the Ludington division and take coal and water, as well as taking coal on the northwest wye and water at the standpipe on their own division, without coming onto the Ludington main line. The freighthouse was in the southeast corner of the diamond. The target house, from which this crossing signal was operated, was in the corner of the freighthouse next to the diamond,

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in the southeast corner. The order board at Baldwin was situated at the target house, east of the diamond.

There was a snowbank on the south side of the track, extending east and west from the standpipe, around which a path had been shoveled. The bank extended about 15 feet east of the standpipe. It began at the end of the ties, about 16 or 18 inches from the rail, and sloped up gradually; the highest point being about four feet from the south rail. At the deepest point, this bank was estimated by various witnesses as being from 2½ to 4 feet deep. The bank was highest around the standpipe, and there ice had formed on its surface on account of the dripping from the pipe. There was a similar bank west of the pipe. This bank had been there since the early part of the winter.

About 4 o'clock on the morning of the accident, two engines were standing in the vicinity of the coal dock, both having taken coal. Engine 166 was on the southwest wye about opposite the coal dock, standing with its headlight toward the west. Engine 186, which had brought a train from Petoskey, had worked in the eastern part of the yard and come west to the coal dock along the Ludington main line, and was standing near the waterspout. The weather was, in the language of the witnesses, "muggy, dull, and heavy—a bad night; and the smoke of the engines tended to settle to the ground." The plaintiff's testimony tended to show that her intestate approached the crossing from the west with his engine under control. When Mr. Mellish's train was a very short distance west of the coal dock, the head brakeman and the fireman saw the headlight of engine 186 in front of them. At that instant, according to the plaintiff's testimony, Mr. Mellish applied his emergency brake and did all that he could to stop his train. He was unable to stop it, however, until it had gone an engine length and a car length over the intersection, and had collided on the way with engine 186, inflicting considerable damage on both engines. The testimony was that the engines collided at a point between the waterspout and the intersection. When the engines stopped, engine 334 was found to be derailed, and Mr. Mellish's body was found under the train at the intersection. It does not appear how, or exactly when, he left his engine, or whether he fell or jumped; but from the marks on the snow and traces of blood along the track the plaintiff claimed the right to go to the jury on the theory that after he had done all he could to stop his train he jumped from his engine, struck the snowbank near the standpipe, and rolled back under the wheels. The testimony as to the speed at which he was going when he passed the coal dock and struck the other engine is stated by various witnesses at from 6 to 18 miles an hour. Mr. Mellish was familiar with the Baldwin yards, having run through them as an engineer

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for many years, having been through them 161 times in the preceding year, and having switched in the yards 74 times during the same period.

The trial court submitted the case to the jury for their consideration upon two principal grounds of negligence on the part of defendant, stated to be the negligence relied upon by plaintiff, viz., first, the unlawful removal of the interlocking plant, substituting therefor an ordinary diamond with a single signal. The second claim is stated by the court as follows: "A second claim of plaintiff is that after wrongfully removing such interlocking and derailing switch and signal system defendant carelessly and negligently failed and omitted to install any mechanical device, or to provide for any notice or warning to train employees on its Ludington division, approaching from the west at night, of the presence on the main line at said coal shed or waterspout of engines from its Petoskey division, when taking coal or water thereat; but, on the contrary, that its semaphore or target system employed at the time of the death of Mr. Mellish was such that, when so approaching with his engine at night, the signal given Mr. Mellish, when given, indicated to him that the track on which he was approaching, between his engine and the diamond, was clear of engines, cars and trains, when in fact it might be occupied by an engine from said Petoskey division for the purpose stated; and the claim made by plaintiff hereunder is that a system so misleading in fact was careless and negligent in its operation and effect, and that, as Mr. Mellish did so approach with his engine on the morning in question, such semaphore or target did show clear, as entitling him to the right of way over said track to the diamond, while in fact such right of way was obstructed by said engine from the Petoskey division so standing, and that such system being so careless, negligent, and misleading in its operation and effect that this was another cause of the death of Mr. Mellish, contributing and co-operating with the unlawful removal of such interlocking and derailing switch and signal system."

The jury returned a verdict for plaintiff, and defendant brings the case to this court for review.

[1] 1. The court instructed the jury (a) that it was negligence, as a matter of law, to remove the interlocking system; (b) that "It is the claim of plaintiff that the interlocking and derailing switch and signal system so installed, approved, and thereafter modified by said order of the Commissioner of Railroads, on March 25, 1896, when properly employed and operated, would have been of an aid and assistance in notifying and warning Mr. Mellish and the co-workers on his engine and train of the presence of engine 186 at or near the waterspout in time to have avoided the collision, and that if it had not been so removed such collision would have been averted; if you find

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this to be true, then you may say that the unlawful removal was the proximate cause of the death of Mr. Mellish." The legal effect upon plaintiff's rights of defendant's action in removing the interlocking system constitutes the crucial question in the case. Disregarding other serious questions raised by counsel for defendant, we are of the opinion that the accident in question was not within the purview of the statute, and its violation was not the violation of a duty owed to persons in the deceased engineer's situation.

The order in this case was made upon application to the railroad crossing board, in accordance with the provisions of section 6232, Compiled Laws, which provides, among other things, as follows: "And at the time of approving said map said board may determine the place where and the manner in which said crossing shall be made, whether at grade or otherwise, and if at grade, what safeguards shall be provided by the company desiring to make such crossing to protect against accidents thereat."

The order of the board, of which the Railroad Commissioner was a member, was in part as follows: "That for the protection of said crossing against the danger of accident from collisions thereat, the said Chicago & West Michigan Railway Company should at its own proper cost and expense procure and erect at said crossing an interlocking and derailing switch and signal appliance, to be approved by the Commissioner of Railroads before the same shall be adopted for use, and after such approval to be thereafter efficiently operated and maintained at the point and equal expense and cost of each of the said Chicago & West Michigan Railway and Flint & Pere Marquette Railroad Companies, unless otherwise agreed by and between said companies respectively."

The order of the Commissioner, after reciting full compliance by the railroad with the order of the board, proceeds: "And being satisfied from a personal inspection of the same that the use of the safety device constructed by the said Chicago & West Michigan Railway Company and now ready for operation will insure the safety of trains at said crossing without the necessity of the same being brought to a full stop before going thereupon, as is required by the provisions of Act 198, Session Laws of 1873, and the several acts amendatory thereof. Now, therefore, by virtue of the authority in me vested by the several statutes of the state of Michigan in such case made and provided, I do hereby authorize and permit the engines and trains employed in the traffic of your said road respectively on and after the hour of 7 o'clock a. m. of Monday, the second day of December, A. D. 1889, to pass over said crossing without the necessity of said engines or trains being brought to a full stop," etc. "In approaching said crossing, the speed of your engines and trains

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will not exceed at the home signal on either side thereof, for passenger trains, twelve miles, and for wild engines or freight trains, eight miles per hour, and will not be increased until the entire train has left the crossing."

The statute, the order of the crossing board, and of the Railroad Commissioner contemplate protection at the crossing of intersecting railroad tracks against collisions of trains upon such tracks, and not against collision of trains upon the same railroad track, whether near to or far from the crossing. This being the case, "those only to whom the duty is due and who have sustained injuries of the character its discharge was designed to prevent, can maintain actions upon it." *Chicago, etc., Ry. Co. v. Minneapolis, etc., R. Co.*, 176 Fed. 237, 100 C. C. A. 41; *Gorris v. Scott*, 9 Exch. (L. R.) 125. The principle upon which the rule rests is so clearly expounded in *Gorris v. Scott* that we content ourselves with a reference to the opinions of the judges therein for further elucidation thereof. It results that, since the defendant owed no duty to plaintiff's intestate to maintain an interlocking system to protect him against any other injuries than those due to collisions with trains on the intersecting road, its removal of such system was not actionable negligence under the circumstances of this case; but such negligence must be predicated upon other grounds.

[2, 3] 2. Plaintiff's intestate was thoroughly familiar with the situation at Baldwin, including the signal system in use after the removal of the interlocking system. His train was an extra third-class freight train. Rule 91c of the company is as follows: "91c. All extra and delayed third class freight trains must pass into and through all stations, and must approach side tracks, water tanks and fuel stations with train under control, expecting to find a train at such point. Speed must be reduced so that it shall not be possible to strike any train that may be within the station switches or that may be taking fuel or water. In such cases the responsibility for safety rests on the approaching train. When fog, snow, darkness, dangerous places or other circumstances render it necessary, a train occupying main track at a station must, as an additional precaution, be protected as per Rule 99. This will not, however, relieve the approaching train of responsibility for accident." Under this rule, it was not negligent for the locomotive No. 186, to be at the coal dock or water tank, and the failure to send out a flagman as required by rule 99 was the negligence of a fellow servant, which Mr. Mellish was warned he must anticipate. In view of rule 91c, the defendant was not guilty of actionable negligence in permitting its locomotives to take fuel and water upon the Ludington track, without other warning to approaching trains than the rules provided

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for. *Enright v. Railway Co.*, 93 Mich. 409, 53 N. W. 536; *Whaler v. Railway Co.*, 114 Mich. 512, 72 N. W. 323; *Moyer v. Railway Co.*, 159 Mich. 645, 124 N. W. 542.

[4] So far as the character of the signal system was concerned, if it was faulty, which we do not determine, Mr. Mellish was fully acquainted with the dangers attending its use, and must be deemed to have assumed the risk thereof. *Lynch v. Traction Company*, 153 Mich. 174, 116 N. W. 983, 21 L. R. A. (N. S.) 774.

The judgment is reversed, and a new trial ordered.

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(Supreme Court of Washington, May 27, 1912.)

[123 Pac. Rep. 998.]

Carriers—Charges—Scope and Effect of Statutory Regulations.*—

The performance of a contract by which a railroad company, in consideration of the conveyance of land to it, agrees to give annual passes to the grantors during their lifetime, made prior to Commerce Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1134), is forbidden by section 6 of that act, providing that no carrier shall charge or receive a greater or less or different compensation for the transportation of passengers than the rates specified in the tariff filed as required by that act.

Contracts—Rescission—Grounds for Denial.—Where an agreement by a railroad company, in consideration of the conveyance of land to it, to give annual passes over its lines to the grantors was performed by it until the further performance was prevented by Commerce Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1134), and in the meantime the property had greatly increased in value, a rescission of the contract for failure to perform should not be granted.

Contracts—Discharge by Impossibility of Performance.—The failure of a railroad company to perform an agreement to give annual passes to persons conveying land to it does not give rise to any cause of action in favor of the grantors, where performance was prevented by Commerce Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1134).

Action—Nature and Elements of Cause of Action.—A cause of action must show a legal or equitable right in one party and a wrong in the other party touching the subject-matter of the action.

*For the authorities in this series on the subject of railroad passes, see last foot-note of *John v. Northern Pac. Ry. Co. (Mont.)*, 39 R. R. 484, 62 Am. & Eng. R. Cas., N. S., 484, where all those preceding it are collected.

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Appeal and Error—Review—Invited Error.—In an action for rescission of a contract, an erroneous judgment for damages will not be upheld on the theory that it was entered by defendant's consent, where, although defendant's counsel remarked that defendant would consent that the court give damages, it appeared that this remark was not considered by the court in rendering judgment, especially where both parties appealed.

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by H. T. Cowley against the Northern Pacific Railway Company. From a judgment for plaintiff for insufficient relief, he appeals, and the defendant cross-appeals. Reversed, with directions.

Edward J. Cannon, of Spokane, for appellant.

H. M. Stephens, of Spokane, for respondent.

GOSE, J. On the 31st day of December, 1898, the plaintiff and his wife, Lucy A. Cowley, now deceased, were the owners of a tract of land in the city of Spokane, and on that date they entered into a written contract with the defendant whereby they agreed to convey the property to it by a deed of quitclaim. As a consideration for the conveyance of the property, the defendant agreed to issue and deliver annual passes to the plaintiff and his wife, for and during the natural life of each thereof, entitling them to free transportation over the defendant's entire system of railway and steamship lines, and to issue like passes to their five children for a period of five years from the date of the contract. In pursuance of the contract, the plaintiff, on October 20, 1899, conveyed the property to the defendant. The defendant performed its agreement with Lucy A. Cowley until her death, which occurred on the 28th day of November, 1900, and performed its agreement with the children during the five years stipulated in the contract, and performed its agreement with the plaintiff until the taking effect of the act of Congress of date June 29, 1906, known as the Commerce Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, pp. 1149-1153]). Section 6 of the act is as follows: "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges

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which are specified in the tariff filed and in effect at that time, nor shall any carrier refund or remit, in any manner or by any device, any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

The plaintiff's children have conveyed to him whatever rights they may have in the property. After the taking effect of the act, the defendant refused to further perform its contract, upon the ground that it could not legally do so. The plaintiff has sued for a rescission of the contract and for a reconveyance of the property. He offered in his complaint to repay to the defendant the value of all the transportation issued in conformity to the contract. The court denied a rescission and reconveyance, and entered a judgment against the defendant for the sum of \$1,500, the amount which the court found the plaintiff will be obliged to expend in railway fare to take the trips which he would have taken had the agreed transportation been furnished him. Both parties have appealed, and they will be referred to as plaintiff and defendant. The following is an epitome of the facts: The plaintiff at the time of the trial had been a resident of Long Beach in the state of California for about eight years, and was then 73 years of age and had a life expectancy of approximately 7 years. The court found that the market value of the property when conveyed to the defendant was about \$15,000, and that its value at the time the action was commenced was \$200,000.

[1] The act of Congress to which reference has been made forbade the further performance of the contract by the defendant. *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 183. That was an action to require the railway company to specifically execute a contract which it had made with the Mottleys, to issue to them free passes over its roads annually during their lives in settlement of a claim which they were asserting against it for personal injuries sustained by them as the result of a collision between trains belonging to the railroad company. In commenting upon the question of the enforceability of the contract, the court, at page 482 of 219 U. S., at page 270 of 31 Sup. Ct. (55 L. Ed. 183), said: "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist. And at page 483 of 219 U. S., at page 271 of 31 Sup. Ct. (55 L. Ed. 183), it said: "After the

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commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court." And again, at page 485 of 219 U. S., at page 271 of 31 Sup. Ct. (55 L. Ed. 183), it said: "We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made."

[2] The defendant, in support, of his contention that he is entitled to rescind and to have the property restored to him, among other cases, cites the following: *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815; *Garvey v. Garvey*, 52 Wash. 516, 101 Pac. 45; *Lambert v. Lambert*, 66 W. Va. 520, 66 S. E. 689, 19 Ann. Cas. 537; 24 Am. & Eng. Ency. Law. (2 Ed.) 641; *Willard v. Ford*, 16 Neb. 543, 20 N. W. 859; *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629. In the *Thomas Case* the court, in discussing the doctrine of rescission, said: "Rescission is a remedy which is not to be enforced as a matter of course or of absolute right, but, like specific performance, its exercise rests in the sound discretion of the court. 2 Warvelle, Vendors, p. 833. * * * Before a party can justly claim a rescission, he must not only show that the opposite party is derelict, but that he himself is without fault. * * *" In the *Cochran Case* it is said: "Where one of the parties to a contract, either before the time for performance or in the course of performance, makes performance or further performance by him impossible, the other party is discharged and may sue at once for the breach." 9 Cyc. 639, and authorities cited. The *Garvey* and *Payette Cases* were actions by a parent against a child to have property reconveyed, where the consideration for the conveyance was the support of the grantor, and the grantee had failed or refused to perform. In the *Lambert Case* the grantor had conveyed certain property to the grantee, upon a promise of marriage which the grantee had broken by marriage with another. The rule announced in 24 Am. & Eng. Ency. Law (2d Ed.) 641, is that, "in granting cancellation of an instrument, the court proceeds wholly upon equitable principles." In the *Willard Case* it is said that "the rescission, cancellation, and delivering up of agreements, deeds, etc., is the converse of a specific performance." In the *Chapman Case*, in considering the question as to when the illegality of a contract will excuse performance, the court said that "the illegality in the contract related, not to its substance, but only to a specific mode of performance." And further that: "The illegality is not that which arises where the contract is in violation of public policy or of sound morals, but under which the law will give no aid to either party."

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Without further reference to authority, it suffices to say that the performance of the contract was not arrested by the act or omission of the defendant, but by the enactment of a law which made further performance of the contract illegal. The case falls within the exception stated in the Chapman Case. In the cases cited by the plaintiff there was an equitable right in the plaintiff and a delict upon the part of the defendant. In other words, the defendant had agreed to do some act which he either could not or would not do, the doing of which would violate no law or rule of public policy. In view of the intervening law, the substantial performance of the contract by the defendant, and the marked increase in the value of the property, a court of equity cannot, in consonance with equitable principles, direct a restitution of the property.

[3] The next question presented is: Did the court err in entering a judgment against the defendant for damages? Drake v. Whaley, 35 S. C. 187, 14 S. E. 397, thus defines a cause of action: "A 'cause of action' has been held, in brief, to be a legal right of the plaintiff invaded by the defendant, and it arises when the invasion takes place." In Kennerty v. Etiwan Phosphate Company, 21 S. C. 226, 53 Am. Rep. 669, it is said that: "A cause of action, defined in a few words, is a primary right of one, either legal or equitable, invaded by another."

[4] Stated in other words, a cause of action must show a legal or equitable right in one party and a wrong in the other party touching the subject-matter of the action. If these elements do not coexist, a cause of action does not arise. In Pomeroy on Contracts, § 280, the rule respecting illegal contracts is stated as follows: "An illegal contract is, as a rule, void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether, being valid when made, the illegality has been created by a subsequent statute." Brown v. Mayor, etc., 9 Com. Bench Rep. (N. S.) 725, was a suit upon a contract, with a condition the performance of which was rendered impossible by an act of Parliament. Speaking to the question of a discharge of a contract by such a law, Williams, J., said: "The instrument upon which this action is brought is not an absolute contract on the part of the defendants to pay the several sums mentioned in the bonds. But it is a contract with a condition. Now, the law as to such contracts is clear. If the condition has been performed, the obligation is discharged; and it is equally discharged if, instead of the condition having been performed, its performance has been prevented by the act of God or the act of the law." In Bullard v. Northern Pacific Ry. Co., 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246, it was held that rebates upon shipments, under a contract fixing the price of carriage

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and providing for a rebate equal to the difference between the contract price and the regular schedule of freight rates upon like articles, could not be recovered after the enactment of the Commerce Law of February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. Supp. 1911, p. 1284]). In this connection the court said: "There is an old rule of law which can be invoked and applied to the case at bar. In *Atkinson v. Ritchie*, 10 East, 530. Lord Ellenborough, Ch. J., said, in the opinion: 'That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt.'" *American Mercantile Exch. v. Blunt*, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022, is an instructive case, and announces the same view. See, also, the footnote to this case in 10 L. R. A. (N. S.). In *Doe on Demise of Marquis of Anglesea v. Church Wardens of Rugeley*, 6 Q. B. 107, in speaking of the nonperformance of a condition in a lease because forbidden by law, it is said by Lord Denman, C. J.: "But even if the condition were not performed, it appears to us that the nonperformance would in this case be excused, as being by act of law, and involuntary on the part of the lessee." In *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70, in defining the words "obligation of a contract," it is said: "The obligation of a contract in law is that element of duty or promise which a party can be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract." These observations apply with equal force to both questions, viz., the right of the plaintiff to a rescission and a reconveyance, and his right to damages. The plaintiff conveyed the property to the defendant upon the faith of defendant's promise to perform conditions which were then wholly lawful, but which, after a substantial part performance, became unlawful without any contributing cause upon the part of either party. The full performance has not been arrested by any act or omission of the defendant, but by the Congress of the United States acting within its constitutional powers. It follows, from what has been said, that the defendant cannot be mulcted in damages because of and only because of its observance of a law making further performance of the contract on its part impossible.

[5] The plaintiff's contention that the judgment for damages was entered upon the invitation of the defendant cannot be upheld. The contention is based upon the remarks of the defendant's counsel at the conclusion of the trial, wherein he said: "I will say now that we will consent that the court reach a just measure of damages." In the certificate to the supplemental statement containing the quoted words, the court states that "I will

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add that my decision was not influenced by any suggestion made by Mr. Cannon as to the attitude we take upon the merits of the controversy." Were it not for this statement in the certificate, we would be inclined to treat the judgment having been entered by the court upon the invitation of counsel for the defendant. Moreover, the plaintiff was not content to accept the judgment. Had he done so, and had the defendant only appealed, we would be more inclined to treat the remarks of the defendant's counsel as an authorization for the judgment.

The judgment is reversed, with directions to dismiss the action.

MOUNT, PARKER, and FULLERTON, JJ., concur.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *App't.*, v. F. W. COOK BREWING COMPANY.

(Submitted November 13, 1911. Decided January 22, 1912.)

[32 Sup. Ct. Rep. 189.]

Courts—Appeal—Federal Question.—The jurisdiction of a Federal circuit court of a suit by an Indiana corporation to enjoin a common carrier incorporated under the laws of Kentucky from refusing to accept interstate shipments of intoxicating liquors consigned to local-option points in Kentucky was not dependent upon diverse citizenship alone, so as to make the judgment of the circuit court of appeals final, where there was involved not only the validity of the Kentucky statute as a regulation of interstate commerce, but the question as to whether the sole remedy was not by an application to the Interstate Commerce Commission.

Appeal and Error—Objections Not Raised below.—The objection that there was an adequate remedy at law where a common carrier refused to accept interstate shipments of intoxicating liquors destined to local-option or "dry" points in another state, and announced its purpose to persist in such refusals, comes too late, if ever available, when first made on appeal.

Commerce—State Regulation—Intoxicating Liquors—Carrier's Refusal to Accept.—A carrier incorporated under the laws of the state of Kentucky cannot justify its refusal to accept interstate shipments of intoxicating liquors consigned to localities in that state where local-option prohibitory laws prevail, under Ky. act of March 21, 1906, making the transportation of such shipments unlawful, since such statute, as applied to interstate shipments, is an unlawful regulation of commerce.

Commerce—Refusal to Accept Interstate Shipment—Necessity of Action by Interstate Commerce Commission.—A shipper seeking relief because of the refusal of a carrier to accept interstate shipments of intoxicating liquors consigned to local-option or "dry" points.

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which the carrier seeks to justify under a state statute forbidding the transportation of such shipments, which is attacked as an unlawful regulation of commerce, may invoke the jurisdiction of the courts without first applying to the Interstate Commerce Commission, since the question involved is one of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Indiana, enjoining a carrier from refusing to accept interstate shipments of intoxicating liquors consigned to local-option or "dry" points. Affirmed.

See same case below, — L. R. A. (N. S.) —, 96 C. C. A. 322, 172 Fed. 117.

Statement by Mr. Justice Lurton:

This suit started in a court of the state of Indiana, and was removed by the defendant, now the appellant, to the circuit court of the United States.

The brewing company is an Indiana corporation, engaged in brewing beer at Evansville, Indiana, and sells its product in state and interstate trade. The railroad company is a Kentucky corporation, owning and operating a line of railway extending into many states, including Indiana and Kentucky.

The complaint averred that although prepayment of freight had been tendered and every shipping regulation complied with, the railroad company had refused to accept for carriage from Evansville, Indiana, to stations on the line of its railway in the state of Kentucky, beer in kegs and cases, consigned to points which were "local-option" or "dry" localities under the law of Kentucky, and had notified complainant and the public that it would discontinue receiving consignments of beer or other liquors for points in the state of Kentucky where the local-option law of that state was in operation. The prayer of the bill was that the railroad company be enjoined from so refusing to accept the product of the brewing company for transportation from Evansville to such local-option points in Kentucky.

A preliminary injunction was issued as prayed. Thereupon the defendant removed the case to the circuit court of the United States, upon the ground that there was diversity of citizenship, and also because the case involved questions arising under the Constitution and laws of the United States; namely, the validity of the law of Kentucky, prohibiting the transportation and delivery of liquors to points in that state where the sale was prohibited, and also as a case arising under the act of Congress regulating interstate commerce of February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], as amended June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp.

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Stat. Supp. 1909, p. 1149]. An answer was then filed and the cause heard upon bill and answer, with the result that the preliminary injunction allowed by the state court was made permanent, and the railroad company enjoined from refusing to receive and carry beer from Evansville to any point upon its line of road in the state of Kentucky, wet or dry. An appeal by the railroad company to the circuit court of appeals resulted in an affirmance of the order of the circuit court. For the opinion see 172 Fed. 117.

Messrs. *Henry L. Stone, Philip W. Frey, and George R. DeBruler* for appellant.

Mr. *George A. Cunningham* for appellee.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court:

1. The jurisdiction of this court to entertain an appeal in this case cannot be seriously controverted. The jurisdiction of the circuit court was not dependant alone upon diversity of citizenship. There was involved not only the validity of the law of Kentucky as a regulation of interstate commerce, but a question as to whether the sole remedy in any such case was not by an application to the Interstate Commerce Commission.

2. The objection that there was an adequate remedy at law, assuming that the subject is one for any tribunal other than the Interstate Commerce Commission, comes too late, if ever available, the objection being now made for the first time, so far as is discoverable from the record. The announced purpose of the railroad company to abjure its function and duty as a common carrier in respect of interstate shipments of all intoxicating liquors to localities in the state of Kentucky where the Kentucky local-option prohibition laws prevailed threatened the ruin of complainant's business, and relief by injunction against such a continued course of conduct was certainly one which in such circumstances might be granted. Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say that there was an adequate remedy at law only upon review proceedings. *Kilbourn v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

3. The case was heard upon bill and answer. The defense is based solely upon the terms of the Kentucky act of March 21, 1906, now § 2569a, Carroll's Kentucky Statutes of 1909, entitled an act "to Regulate the Carrying, Moving, Delivery, Transferring or Distribution of Intoxicating Liquors in Local-option Districts." By that act it is made unlawful for any common carrier to transport beer or any intoxicating liquor to any consignee in any locality within the state where the sale of such liquors has been prohibited by vote of the people under the

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local-option law of the state. A violation of the law subjects the offender to a fine of not less than fifty nor more than one hundred dollars for each offense.

Upon the assumption that this legislation effectively prohibited both state and interstate transportation of such commodities within the state, the railroad company notified all of its agents, in and out of the state, to refuse to receive such liquors when consigned to any local-option point. This notification was by a printed circular letter, which set out the full text of the act, and gave a full list of all such local-option points. In express terms this notification applied to both inter and intrastate shipments; and, it is averred, this circular was filed with the Interstate Commerce Commission. It is not, however, averred that the Commission either took any action thereon, or that it was asked to take any action.

The legality of the attitude of the railroad company toward interstate shipments of intoxicating liquors to local-option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments.

By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it has been indisputably determined:

a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

b. That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another;

c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition.

The Wilson act (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee, where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson act construed are: *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Heyman v. Southern R. Co.*, 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633.

Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky court of appeals, upon the authority of the line of cases above cited, reached the same con-

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clusion. Cincinnati, N. O. & T. P. R. Co. *v.* Com., 126 Ky. 563, 104 S. W. 394.

The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other states, any commodity which is an ordinary subject of interstate commerce and such transportation, could not be prohibited by any law of the state of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce, not authorized by the police power of the state. It is obvious, therefore, that in so far as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight.

The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the state court nor the circuit court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.

Why should the brewing company have made complaint to the Commission? What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evansville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law, for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

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The decision in the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate-making necessarily required a resort to that body as a basis for a common-law recovery of an excessive charge.

The result is that the decree of the court below must be affirmed.

CORNETTE *et ux.* *v.* BALTIMORE & O. R. Co.

(Circuit Court of Appeals, Third Circuit. January 31, 1912.)

[195 Fed. Rep. 59.]

Courts—Federal Courts—Conformity to State Practice.—The federal courts conform to the procedure prescribed by Act Pa. April 22, 1905 (P. L. 286), giving a party requesting binding instructions which have been refused the right to move the court to have all the evidence taken on the trial certified and filed so as to become a part of the record, and for judgment non obstante veredicto on the whole record, and a federal court on motion for judgment non obstante veredicto may order that the evidence taken by an official stenographer, becoming under Act. Pa. May 1, 1907 (P. L. 135), a sworn officer of the court, be certified and filed so as to become a part of the record.

Judgment—Nunc Pro Tunc—Remedy.—A federal court ordering on a motion for judgment that all the evidence on the trial shall be certified and filed so as to be a part of the record in the case, and having the testimony before it when entering judgment based thereon, may at a subsequent term correct the omission of the clerk to mark the evidence filed and the judge to certify that it is correct, and thereby make the evidence a part of the record.

Carriers—Passengers—Injuries—Evidence.*—Where a passenger suing for injuries caused by her hand being caught between a door and the frame of the car while alighting did not show the cause of

*For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to the opening and closing of car doors, see last foot-note of *Christensen v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; first foot-note of *Kearney v. Oregon R. & Nav. Co.* (Ore.), 41 R. R. R. 172, 64 Am. & Eng. R. Cas., N. S., 172; extensive note, 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688.

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the door swinging and catching her hand, or any act of commission or omission of the carrier or its servants, she failed to show facts justifying an inference of the carrier's negligence.

In error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Ernest Cornette and wife against the Baltimore & Ohio Railroad Company. There was a judgment for defendant, and plaintiffs brings error. Affirmed.

Thomas L. Kerin and *Lowrie C. Barton*, for plaintiffs in error.

William Watson Smith, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Ernest Cornette, in his own right, and Jennie Cornette, his wife, in her own right, citizens of Pennsylvania, brought suit and recovered a verdict against the Baltimore & Ohio Railroad Company, a citizen of Maryland, for damages for personal injuries sustained by the wife while a passenger on such road. Subsequently, on defendant's motion, a judgment non obstante veredicto was entered in its favor. Thereupon plaintiffs sued out this writ and assigned for error the entry of such judgment.

The case involves two questions: First, the right of the court below, subsequent to the term at which it entered judgment non obstante veredicto under the Pennsylvania statute of April 22, 1905 (P. L. 286), to certify the evidence on which it entered such judgment; and, secondly, if such evidence is properly before us, was the court below in error in entering judgment for the defendant thereon?

[1] Addressing ourselves to the first question, we note that the defendant, after a verdict in favor of the plaintiffs, in pursuance of the statute, moved the court "to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment for defendant non obstante veredicto upon the whole record." Thereupon the court ordered "that all the evidence taken upon the trial be duly certified and filed so as to become part of the record in the case." In accordance therewith, the stenographer in this case transcribed the evidence and duly certified the same, and delivered such testimony and certificate to the judge. This testimony was used by the court at the hearing of the motion for judgment, and was made the basis of the court's opinion in deciding the same. It will be noted that by the Pennsylvania act of May 1, 1907 (P. L. 135), relating to the appointment of official stenographers, they become sworn officers of the court. That act, to which the federal courts conform (*Fries-Breslin Co. v. Bergen*, 176 Fed. 76, 99 C. C. A. 384; *Smith v. Jones*, 181 Fed. 820,

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104 C. C. A. 329), further provides that it shall be the duty of the official stenographer to make a typewritten transcript of his notes, and that such transcript "shall be filed in the proper office of the court, and shall thereafter become a record of the proceedings therein reported," and "shall be taken and held to be prima facie correct." It will thus be seen that under the order of the court the notes had been duly transcribed, delivered to the judge, and used by him in the disposition of the case.

[2] The only thing lacking was the omission of the clerk to mark the notes filed and the judge to certify that they were correct when he directed entry of judgment non obstante verdicto. Was this oversight an omission of the vital, fundamental character which a court is powerless to rectify, and supply after the expiration of the term? Clearly not. It is, of course, true that certain things, as, for example, the alteration of a judgment so as to affect vested rights, cannot be done after the term, but, where the mistake is the mere clerical omission of an officer and its correction merely makes the record conform to the truth, there the ending of the term does not end the court's power. As said in 1 Black on Judgments, § 154 (citing *Coughran v. Gutcheus*, 18 Ill. 390):

"After the expiration of the term, unless the cause is still depending and the parties are in court, their power over the record is confined to errors and mistakes of their officers; and these may at any time, upon notice to the parties in interest, and saving such rights as in the interval of time may have accrued to third persons, be corrected so as to make the record conform to the actions or judgment of the court."

And section 155:

"As regards mere clerical errors, mistakes arising from inadvertence or formal misprisions of clerks or other officers, it is always in the power of the court, even after the adjournment of the term, to make such corrections or amendments as truth requires."

In the present case, as we have seen, the omission of the clerk to mark the notes of testimony filed which the judge used in disposing of the case was a mere clerical, formal oversight. The court had the testimony before it, and the judgment it entered was based thereon. Can it be possible that the expiration of the term rendered it absolutely impossible for the court to certify, which it did in this case as soon as the omission was discovered, though this was in a subsequent term, that the testimony which had been used by the court was correct? The actual possession and use by the court of the notes were the matters of substance. The matter of form was the omission of the clerk to mark the testimony filed and of the judge to certify the same. Assuredly a court should not thus shear itself of a salutary power to do justice by holding itself powerless

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to supply a formal omission, where in doing so it affects no vested right. We are therefore of opinion the certificate of the judge in this case duly brings the evidence on the record. This conclusion is in no way at variance with *McCord v. B. & O.*, 187 Fed. 745, 109 C. C. A. 493, where "the evidence was never certified, either then or at any time thereafter." This we held "was a failure to comply with an indispensable requirement," but it was added:

"Under ordinary circumstances, it is probably an unimportant detail when the certification takes place, at least while the court's power over the case continues, but at some time the judge must certify, and he himself must perform the act."

[3] We have examined the evidence, and we agree with the court below that it disclosed no negligence on the part of the defendant company and no facts from which negligence could be inferred. In substance, it shows that, when the train in which Mrs. Cornette was riding reached her station, she started to leave the car. While passing from the car its door swung and caught her hand between it and the door frame. No act of commission or omission on the part of the railroad or its servants was shown, and the plaintiffs gave no evidence as to what caused the door to swing, or, indeed, any explanation of the cause of the accident. In view of the full discussion of the matter in the opinion below, we refrain from further extending this opinion. The whole matter is well summed up by the trial judge in the statement, in which we concur, that:

"The plaintiff's case must fail because there is no evidence showing the cause of the accident. It cannot be inferred from the circumstances of the accident and outside of this there is no evidence."

The judgment below is therefore affirmed.

CARNEY *v.* BOSTON ELEVATED RY.

(Supreme Judicial Court of Massachusetts, Suffolk, May, 25, 1912.)

[98 N. E. Rep. 605.]

Negligence—Res Ipsa Loquitur—Application.—The doctrine *res ipsa loquitur* does not apply, though plaintiff's injury resulted from the operation of an apparatus by defendant wholly under its management and control, where it also appears that the accident has occurred from the lawful operation by lawful means of an authorized instrumentality, and the injury that has resulted may have come without negligence as the result of an unavoidable accident.

Electricity—Production and Use—Injuries—Sparks.* — Plaintiff, while riding as a passenger on an open surface car beneath defendant's elevated structure, looked up as an elevated train passed overhead, and was struck in the eye by a spark coming from the elevated road, probably from the contact shoe of the train. The elevated railroad was operated by proper authority in the proper manner, and there was nothing to indicate that defendant should have foreseen any particular danger or guarded against the same, or given warning of its existence, nor was there any evidence that there was any practicable method of checking the emission of sparks from trains, or its electrical apparatus, or preventing their falling into the street. Held, that plaintiff was not entitled to recover under the doctrine *res ipsa loquitur*.

*For the authorities in this series on the subject of the *res ipsa loquitur* doctrine, see generally foot-note of *St. John v. Rhode Island Co.* (R. I.), 41 R. R. R. 625, 64 Am. & Eng. R. Cas., N. S., 625; first foot-note of *Felske v. Detroit United Ry.* (Mich.), 41 R. R. R. 422, 64 Am. & Eng. R. Cas., N. S., 422; foot-note of *Lanning v. Pittsburgh Rys. Co.* (Pa.), 40 R. R. R. 456, 63 Am. & Eng. R. Cas., N. S., 456; first foot-note of *DeGlopper v. Nashville Ry. & L. Co.* (Tenn.), 40 R. R. R. 175, 63 Am. & Eng. R. Cas., N. S., 175.

For the authorities in this series on the question whether a presumption of negligence arises from the mere fact that a passenger is injured, see extensive note, 31 R. R. R. 697, 54 Am. & Eng. R. Cas., N. S., 697; foot-note of *Kingsley v. Delaware, etc., R. Co.* (N. J.), 42 R. R. R. 288, 65 Am. & Eng. R. Cas., N. S., 288; first foot-note of *Doughitt v. Louisville, etc., R. Co.* (Ga.), 42 R. R. R. 161, 65 Am. & Eng. R. Cas., N. S., 161; foot-note of *Birmingham, etc., Power Co. v. McCurdy* (Ala.), 41 R. R. R. 516, 64 Am. & Eng. R. Cas., N. S., 516; last foot-note of *Ledeau v. Northern Pac. Ry. Co.* (Idaho), 41 R. R. R. 232, 64 Am. & Eng. R. Cas., N. S., 232; *Parker v. Boston M. R. R.* (Vt.), 41 R. R. R. 153, 64 Am. & Eng. R. Cas., N. S., 153; last foot-note of *McDonough v. Boston Elev. Ry. Co.* (Mass.), 40 R. R. R. 704, 63 Am. & Eng. R. Cas., N. S., 704; foot-note of *McKittrick v. Greenville Tract. Co.* (S. Car.), 40 R. R. R. 147, 63 Am. & Eng. R. Cas., N. S., 147; *Pittsburg, etc., R. Co. v. Grom* (Ky.), 39 R. R. R. 747, 62 Am. & Eng. R. Cas., N. S., 747; first foot-note of *John v. Northern Pac. Ry. Co.* (Mont.), 39 R. R. R. 484, 62 Am. & Eng. R. Cas., N. S., 484.

Carney v. Boston Elevated Ry

Exceptions from Superior Court, Suffolk County; Charles F. Jenney, Judge.

Action by Lillian R. Carney against the Boston Elevated Railway. Judgment for defendant, and plaintiff brings exceptions. Overruled.

Wm. J. Miller and *Benj. F. Haines*, for plaintiff.

E. P. Saltonstall, for defendant.

SHELDON, J. The plaintiff was injured while she was riding in an open surface car beneath the defendant's elevated structure. She heard the rumble of an elevated train over her car, "saw the sparks flying," looked up and was struck in the eye by a spark, which could be found to have been a minute piece of hot iron, about as large as the head of a pin, coming from the elevated road, and, as we assume, from the contact shoe of the train which was passing thereon. The structure was properly in the street and the defendant was authorized to operate its road by electricity. There was no evidence that it was a frequent occurrence for sparks to fall from its passing trains into the street, or indeed that this had ever before happened. There was nothing to indicate that the defendant ought to have foreseen this danger and to have guarded against it or given warning of its existence. There was no evidence that there was any practicable method or device for checking the emission of sparks from its trains or its electrical apparatus, or preventing their fall to the street, which the defendant had failed to adopt. There was nothing to show any lack of proper care on the part of the defendant in the operation of its trains or cars. Under these circumstances it is manifest that the cases of *Woodall v. Boston Elev. St. Ry.*, 192 Mass. 308, 78 N. E. 446, and *Walsh v. Boston Elev.*, 192 Mass. 423, 78 N. E. 451, cannot help the plaintiff. The ground on which those cases were decided, that there was evidence of an existing danger and of negligence on the part of the defendant in not providing an appliance to prevent the falling of sparks into the street, and in not applying to the railroad commissioners for the approval of a plan to accomplish that object, is lacking here. Either she has chosen, or the facts of the case have compelled her, to rest her claim simply upon the ground that she has been injured by a spark falling on her eye and that this spark came from a train of the defendant lawfully operated upon its elevated railroad.

[1] She contends accordingly that these facts present a case for the application of the doctrine *res ipsa loquitur*—that negligence of the defendant may be inferred from the bare fact that she has been injured in the manner stated. It is true no doubt that the cause of her injury could be found to have come from the operation of apparatus which had been furnished and applied by the defendant and was wholly under its management

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and control. *McDonough v. Boston Elevated Ry.*, 208 Mass. 436, 64 N. E. 809; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 317, 87 Am. Dec. 717; *Miller v. Ocean Steamship Co.*, 118 N. Y. 199, 23 N. E. 462; *Gleeson v. Virginia Midland R. R.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; *Scott v. London Dock Co.*, 3 H. & C. 596; *Kearney v. London, Brighton & South Coast Ry.*, L. R. 5 Q. B. 411. But this single circumstance is not always enough. Where as here the cause of the accident has come from the lawful operation by lawful means of an authorized instrumentality, and where any damage or injury that has resulted may have come without any negligence of the defendant, but may have arisen merely as an unavoidable accident from the careful and skillful exercise of its lawful rights in spite of the observance of all proper precautions, there no liability can arise without some affirmative evidence of negligence. In such a case the happening of the accident with the resulting injury is as likely to have come without the fault of the defendant as to have been due to its negligence, and the presumption of fact upon which the doctrine *res ipsa loquitur* is based does not arise; the inference of negligence cannot be drawn without some evidence to support it. *Beattie v. Boston Elev. St. Ry.*, 201 Mass. 3, 6, 86 N. E. 920; *Minihan v. Boston Elev. St. Ry.*, 197 Mass. 367, 373, 83 N. E. 871; *Thomas v. Boston Elev. St. Ry.*, 193 Mass. 438, 79 N. E. 749; *Wadsworth v. Boston Elev. St. Ry.*, 182 Mass. 572, 574, 66 N. E. 421; *Clara v. New York & New England R. R.*, 167 Mass. 39, 44 N. E. 1054; *Graham v. Badger*, 164 Mass. 42, 47, 41 N. E. 61. For this reason we recently have held that in the absence of a statutory liability a railroad company is not liable, without evidence of negligence on its part, for damage done by fire caused by sparks from its locomotive engines. *Wallace v. N. Y., N. H. & H. R. R.*, 208 Mass. 16, 94 N. E. 306.

[2] For the same reasons, in two cases closely resembling that which is here presented, it was held that no inference of negligence could be drawn from the happening of the accident, and the plaintiff was not allowed to recover. *Searles v. Manhattan R.*, 101 N. Y. 661, 5 N. E. 66; *Wiedmer v. New York Elev. R. R.*, 114 N. Y. 462, 21 N. E. 1041. In the last cited case, the court said that the evidence disclosed a single colorless fact, the emission of a coal smaller than a pinhead, and that the rule *res ipsa loquitur* has not been extended far enough to authorize from this fact an inference of actionable negligence.

It is perfectly consistent with the evidence that the defendant has taken all the precautions that were suggested in *Woodall v. Boston Elev. St. Ry.*, 192 Mass. 308, 78 N. E. 446, or which since have been discovered to be possible. If so, it has not been guilty of negligence. It follows that the judge at the trial acted rightly in ordering a verdict in its favor.

Exceptions overruled.

WINFREY v. MISSOURI, K. & T. Ry. Co.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1912.)

[194 Fed. Rep. 808.]

Carriers—Injury to Passengers—Negligence—Proximate Cause.*—

Where an intoxicated passenger alighted from a north-bound train at his destination, and then entered on the track where he remained when he was struck by a south-bound train about 20 minutes later, the negligence of the trainmen on the north-bound train in failing to see that he was safely removed from the train at his destination was not the proximate cause of his death, and, in the absence of evidence of failure of the trainmen on the south-bound train to give the statutory signals and keep a proper lookout, there could be no recovery.

Negligence—Injury to Passengers—Contributory Negligence—Instructions.—An instruction in an action for the death of a passenger struck by a train after he had alleged, which correctly explains the meaning of contributory negligence, and which states that, if the death of decedent resulted "in any degree" from such contributory negligence, there can be no recovery provided such negligence contributed proximately to the injury, correctly charges on contributory negligence.

Negligence—Contributory Negligence—Statutory Modification.—The rule that any negligence of a plaintiff directly contributing to his injury complained of precludes a recovery, however great the negligence of defendant may have been, has not been modified by Comp. Laws Okl. 1909, §§ 1149, 2938, 2940, making every one responsible for an injury occasioned another by his want of ordinary care, except so far as the latter has, by want of ordinary care, brought the injury on himself, and declaring that the degrees of diligence and of negligence are slight, ordinary, and gross.

Appeal and Error—Instructions—Exceptions—Review.—The rule that an exception to a charge must call the judge's attention to specific phases claimed to be erroneous, so that he may correct them if he desires to do so before the jury retires, must be applied practically with a view of facilitating review, and where in an attempt to take an exception a general reference to a topic discussed in a

*For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see extensive foot-note of *Haley v. St. Louis Transit Co. (Mo.)*, 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all those preceding it are collected; first foot-note of *Crow v. Southern Ry. Co. (Ga.)*, 41 R. R. R. 777, 64 Am. & Eng. R. Cas., N. S., 777; third foot-note of *Plinkiewisch v. Portland Ry., etc., Co. (Ore.)*, 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; *Roberts v. Atlantic Coast Line R. Co. (N. Car.)*, 40 R. R. R. 688, 63 Am. & Eng. R. Cas., N. S., 688.

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charge is made, and the topic constitutes a definite part of the charge clearly distinguishable from and not involved in other parts, the exception is sufficient to require review.

Appeal and Error—Instructions—Exceptions—Review.—Where a large part of the charge in an action for the death of an intoxicated passenger consists of a consideration of the subject of decedent's voluntarily putting himself in a condition of intoxication or danger, and the question is variously commented on in view of some particular phase of the testimony bearing on it, an exception "to the proposition of deceased voluntarily putting himself in a condition of intoxication * * * or danger as not being warranted by the evidence" is too general, and will not be considered on writ of error.

Carriers—Intoxicated Passengers—Care Required.†—Where a passenger is so intoxicated as to be physically unable to care for himself, the trainmen, knowing of his condition, must bestow such care on him as is reasonably necessary for his safety; but, where a passenger is not in such a state of intoxication as renders him unable to care for himself, or where the trainmen do not know of his intoxicated condition, no special care for his safety is required.

Appeal and Error—Invited Error—Right to Complain.—Where an action for the negligent death of a passenger was tried on the theory that decedent's contributory negligence would defeat a recovery, and no suggestion was made that the theory was inapplicable to any phase of the case, any error in giving an instruction on contributory negligence because of submission of the issue of last clear chance was invited or acquiesced in, and was not reviewable.

Carriers—Passengers—Contributory Negligence—Instructions.—An instruction in an action for the death of an intoxicated passenger alighting at his destination from a north-bound train, and entering the track where he remained when struck by a south-bound train about 20 minutes later, which deals with the subject of the carrier's liability for injury to a drunken passenger known by trainmen to be in a dangerous position, and helpless, and which states that the carrier is liable if it fail to exercise reasonable care to prevent injury, and which declares that a man cannot voluntarily place himself in a condition whereby he loses such control of himself as a man of ordinary prudence in the possession of its faculties will exercise,

†For the authorities in this series on the subject of the duties and liabilities of a carrier with respect to passengers or prospective passengers in a state of intoxication, see first foot-note of *Louisville & E. R. Co. v. McNally* (Ky.), 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642; foot-notes of *Tuttle v. Cincinnati, etc., R. Co.* (Ky.), 13 R. R. R. 333, 36 Am. & Eng. R. Cas., N. S., 333, where all those preceding it are collected; last foot-note of *Louisville Ry. Co. v. Wilder* (Ky.), 41 R. R. R. 148, 64 Am. & Eng. R. Cas., N. S., 148; first foot-note of *Hughes v. Chicago, etc., Ry. Co.* (Iowa), 39 R. R. R. 759, 62 Am. & Eng. R. Cas., N. S., 759; *Chesapeake, etc., Ry. Co. v. Selsor* (Ky.), 39 R. R. R. 739, 62 Am. & Eng. R. Cas., N. S., 739; last head-note of *Louisville, etc., Ry. Co. v. Gregory's Adm'r* (Ky.), 39 R. R. R. 382, 62 Am. & Eng. R. Cas., N. S., 382.

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thereby contributing to an injury to himself and then require of one ignorant of his condition recompense therefor, is sufficiently favorable to plaintiff on the issue of voluntary drunkenness.

Negligence—Persons under Disability—Intoxication.†—One voluntarily intoxicated must exercise the degree of care in avoiding danger, as is exacted from a sober person of ordinary prudence under like circumstances.

Trial—Instructions—Refusal to Give Instructions Covered by Charge Given.—It is not error to refuse a requested charge fully covered in the charge given, so far as it is correct and applicable to the issues.

Appeal and Error—Harmless Error—Erroneous Admission of Evidence.—The error in permitting a witness for the successful party to testify that a witness of the defeated party was addicted to the use of morphine, without first laying a foundation for impeachment of the witness by having his attention called to it while testifying, was harmless, where the defeated party could not recover under the evidence.

In error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by Lizzie Winfrey against the Missouri, Kansas & Texas Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

This was an action by Lizzie Winfrey, widow of William Winfrey, for damages occasioned to her by the death of her husband caused by the negligence of defendant Railway Company. The petition charges that the defendant received the deceased into one of its cars at Vinita, Okl., to be carried as a passenger to Blue Jacket, a station about 12 miles north of Vinita, knowing he was so intoxicated as to be incapable of adequately caring for himself; that, on arrival of the train at Blue Jacket, the agents of defendant, still knowing his condition of intoxication, failed to exercise the care and precaution required of them in advising him of the arrival of the train and assisting him to alight; that as a result he, when the train had started up after a brief stop at Blue Jacket, fell off the platform of the car, and in some way got upon the track after the train had passed, and was run over and killed by a south-bound train passing Blue Jacket over the same track about 20 minutes later. It is also alleged that the agents of the Railway Company in charge of the south-bound train negligently failed to maintain a proper lookout or to

†For the authorities in this series on the subject of the contributory negligence of a person as affected by his intoxication, see third foot-note of *Vizacchero v. Rhode Island Co. (R. I.)*, 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172, where all those preceding it are collected; first foot-note of *Hughes v. Chicago, etc., Ry. Co. (Iowa)*, 39 R. R. R. 759, 62 Am. & Eng. R. Cas., N. S., 759.

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stop their train in time to avoid killing Winfrey. The defense was a denial of the alleged negligence and a plea of contributory negligence. On these issues the cause was tried, and resulted in a verdict and judgment for the defendant, from which the plaintiff prosecutes error. The evidence tended to show that Winfrey was with the knowledge of defendant's agents received aboard the train in an intoxicated condition, and continued drinking with two or three companions all the way from Vinita to Blue Jacket.

As to the degree of intoxication, whether it was so great as rendered him unable to properly care for himself, the witnesses differed materially. There was evidence tending to show that, as the train stopped at Blue Jacket, Winfrey and two of his companions arose from their seats, went out of the car upon the station platform in the usual way. On the other hand, there was evidence tending to show that Winfrey did not alight with his companions, but remained on the platform of the car until after the train started, and then fell or was jostled off that platform through a vestibule door which is said to have been left open. The evidence conclusively established that whether the deceased walked off the train with the other passengers or fell, as a result of his intoxication, he in some manner got upon the track, and within about 20 minutes was run over and killed by the south-bound train. There was no substantial evidence that the agents in charge of the south-bound train failed to give the usual signals of its approach to Blue Jacket or failed to maintain a proper lookout.

Upon this and other such evidence the case was submitted to the jury, and a verdict was rendered in favor of the defendant.

W. H. Kornegay, for plaintiff in error.

Clifford L. Jackson, *W. R. Allen*, and *M. D. Green*, for defendant in error.

Before Sanborn, Hook, and Adams, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). The main theory of plaintiff's case as disclosed by the pleadings was that defendant's agents in charge of the north-bound train knew of Winfrey's intoxicated and incapacitated condition, and did not exercise that degree of care required of them to remove him, or see that he was safely removed from the train, at his destination at Blue Jacket; and as a result that the train started while he was in a perilous position, and so known by defendant's agents, and caused him to fall or be precipitated upon the track, and that he was so injured by the fall or so paralyzed by his intoxication that he could not escape before the south-bound train overran him.

Another theory disclosed by the pleadings was that defendant's agents in charge of the south-bound train were guilty of ac-

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tionable negligence, in that they so failed to keep a proper lookout, and so negligently operated their train as to occasion the injury and death of Winfrey.

The court charged the jury among other things as follows:

"If you find from the evidence that the deceased, William Winfrey, did not remain upon the train until after it started to leave the station of Blue Jacket, but left the train at Blue Jacket with the other passengers leaving the train at that point, and, instead of falling from the train, came upon the track in some other way, then your verdict should be for the defendant. * * * If the servants of the company whose duty it is to receive passengers on the trains accept one as a passenger who from drunkenness is unable to care for and look after himself, when such condition is known to them, then the railroad company owes him the duty to exercise with regard to such passenger such care as may be reasonably necessary for his safety, * * * [and] must bestow upon him any special care and attention beyond that given to the ordinary passenger, which reasonable prudence and care demand for his safety. * * * If its servants in charge of the passengers on such train, knowing the facts, fail to give such care and attention, and injury results as an immediate consequence of such failure, then the company is guilty of negligence. * * * If an intoxicated person * * * negligently places himself in a dangerous position, and his danger, by reason thereof, is known to the servants of the defendant in charge of the train, whose duty it is to take care of passengers, it then becomes their duty, notwithstanding his intoxication and its having caused him to become in a dangerous position, to use reasonable and ordinary care—that is, such care as a reasonably prudent person would use under the circumstances—to prevent injuring him. If his dangerous position is discovered, the fact that his negligence has placed him there would not warrant the defendant in not exercising with regard to him that care which it would exercise with regard to any other person, whom it was aware was in a similarly dangerous position. * * * As one of the defenses to this action, the defendant pleads contributory negligence. The plaintiff in this case cannot recover if the want of care or caution on the part of the deceased contributed proximately to his injury; but in such case the deceased would be guilty of what the law terms contributory negligence. * * * If from a preponderance of all the evidence offered by both the plaintiff and the defendant you find that the injury resulted in any degree from the plaintiff's contributory negligence, then your verdict should be for the defendant. * * * In considering the question of contributory negligence of the deceased, I charge you that a man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscle as a man of ordinary prudence and caution in the full possession of his facul-

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ties would exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor. The law of contributory negligence imposes upon one who has voluntarily disabled himself by reason of intoxication the same degree of care and prudence which is required of a sober person. If the voluntary intoxication of a person leads him to place himself in an exposed position, or prevents the full use of his faculties, so that injury results therefrom, and but for such intoxication the injury would not have resulted, then such injured person is guilty of contributory negligence. The mere fact, however, that a person at the time he may receive an injury is intoxicated is not of itself evidence of contributory negligence, but is a circumstance to be considered, and it is for the jury to determine whether it in fact contributed to his injury."

Counsel for plaintiff took exceptions to the charge in these words:

"I * * * except to * * * that portion of your honor's charge withdrawing from the jury the question of the negligence of the defendant in the event it should be ascertained that the deceased got off the train at Blue Jacket."

"I desire * * * to except to that portion of your honor's charge upon the subject of contributory negligence, which instructs the jury that, if the injury resulted in any degree from the deceased's contributory negligence, this should be considered by the jury as cutting the plaintiff off from a right of recovery."

"I desire to except specially to that portion of your honor's charge upon the proposition of the plaintiff's voluntarily putting himself in the condition of intoxication, * * * [and of his] voluntarily placing himself in a position of danger, * * * as not being warranted * * * by the evidence."

I "desire also to except to that portion of your honor's charge which, by itself and uncoupled with the part which came later, told the jury that the same degree of care and prudence is required of a drunken man as of a sober man, for the reason that the same ignores the * * * helpless condition of a drunken man."

"I also desire your honor to instruct the jury that drunkenness itself is not contributory negligence, * * * [and] that drunkenness itself is not sufficient evidence of contributory negligence."

[1] We think there was no error in holding as a matter of law that if the deceased did not remain upon the train after it started to leave the station at Blue Jacket, but left it as other passengers did at that place, plaintiff could not recover. If those were the facts, the first and main specification of negligence could not have been the proximate cause of Winfrey being run over and killed by the south-bound train. These being the facts, his death was not the natural and probable consequence of the alleged negligence of the agents in charge of the north-

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bound train, but some other and intermediate efficient cause must have produced it (*Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256), and, as there was no evidence that the usual or statutory signals were not given or the proper outlook maintained as the south-bound train approached the station, the instruction was clearly right on any phase of the case.

[2] The next assignment of error is founded on the exception to the charge that, if the injury resulted in any degree from the deceased's contributory negligence, plaintiff could not recover. On this subject the court, after explaining what was meant by contributory negligence, charged not only that, if the injury to deceased resulted in any degree from any such contributory negligence, there could be no recovery, but that such negligence must have contributed proximately to his injury. We discover no error in this charge. It is in accord with the established doctrine of this court as announced in *Pyle v. Clark*, 25 C. C. A. 190, 79 Fed. 744, and *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529, 533, 63 C. C. A. 27, 31, and cases there cited, which declare the general rule that any negligence by a plaintiff in a case directly contributing to his injury, precludes recovery by him however great the negligence of the defendant may have been.

[3] It is claimed, however, that this rule has been modified by the statute in Oklahoma, and attention is called to section 1149 of the Compiled Laws of that state (1909), which reads as follows:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned for another by his want of ordinary care or skill in the management of his property or person, except, so far as the latter has, willfully or by want of ordinary care, brought injury upon himself."

And also to sections 2938 and 2940 of the same compilation, which declare that there are three degrees of diligence and three degrees of negligence, namely, slight, ordinary, and great or gross. It is claimed that these three sections have modified the rule governing contributory negligence already referred to. But we do not so interpret them. If the Legislature had intended to modify that well-established rule, it could, and doubtless would, have used language clearly appropriate and efficacious to that end. Moreover, these statutes were originally enacted in 1890, and since then many cases involving the question of contributory negligence have arisen and been decided by the Supreme Court of the state or former Territory of Oklahoma, and notwithstanding the existence of these statutes the rigid rule of nonliability in case of any contributory negligence has been adhered to. *Blevins v. A., T. & S. F. Co.*, 3 Okl. 512, 524, 41 Pac. 92; *Pittman v. City of El Reno*, 4 Okl. 638, 646, 46 Pac. 495; *Severy v. C., R. I. & P. Ry. Co.*, 6 Okl. 153, 161, 50 Pac.

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162. In the last-cited case the Supreme Court, referring to the general rule laid down on this subject by the Supreme Court of the United States in the case of *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, said:

"The rule thus laid down is a salutary one. * * * It is true that, where the doctrine of comparative negligence prevails, juries are permitted to measure the fault of each party contributing to the injury, and award damages against the party whose contribution to the cause of the injury appears the greater. But this is not the law in this territory."

[4, 5] The next exception to the charge is in the language of counsel as follows:

"To the proposition of deceased's voluntarily putting himself in a condition of intoxication * * * [or] danger, as not being warranted by the evidence."

One of the important purposes of exceptions to a charge is to call a trial judge's attention to specific phases, claimed to be erroneous, so that he may reconsider and correct them if he desires to do so before the jury retires. This general rule must, however, be applied practically with a view of facilitating rather than impeding review. Accordingly, if in an attempt to take an exception a general reference to a topic discussed in a charge is made, and if that topic constitutes a succinct and definite portion of the charge clearly distinguishable from and not involved in other portions, it would satisfy all rational requirements. But does the exception just quoted satisfy this demand? A large part of the charge consists of a consideration of the general question referred to in the exception, and the question is variously commented upon in view of some particular phase of the testimony bearing upon it. In such circumstances we are unable to pass on an assignment founded on such an exception. We cannot do so without reviewing the entire charge in the light of all the evidence. This under well-recognized principles of practice we cannot do.

[6] We have, nevertheless, given careful attention to the charge as a whole, and discover that the court repeatedly told the jury in effect that if Winfrey was so intoxicated as to be physically unable to care for himself, and if this condition was known by defendant's agents in charge of the train, they were bound to bestow such care upon him as was reasonably necessary for his safety, and that if Winfrey was not in such a state of intoxication as rendered him unable to care for himself, or if the agents of the company did not know of his intoxicated condition, no such special care was required of him. This is the well-understood general rule governing such cases, and certainly the plaintiff could not have been prejudiced by its announcement and application to her case.

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[7] The next assignment of error relates to contributory negligence broadly considered. Before taking it up, we may, in view of some observations in the brief of plaintiff in error, properly concede that if Winfrey was so intoxicated as to be unable to care for himself on the train, and if defendant's agents knew that he was in imminent danger or peril resulting from his condition of intoxication, the duty to exercise reasonable care and take proper precaution for his safety devolved upon the defendant, notwithstanding any contributory negligence on his part. *Price v. St. L., I. M. & S. Ry. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79. This is a recognition of the law laid down in what are commonly known as the "last-clear chance" cases, which was invoked in plaintiff's petition so far as one phase of the negligence relied upon is concerned. The trial court recognized this law and instructed the jury accordingly. It told them, as already pointed out:

"If his dangerous position is discovered, the fact that his negligence has placed him there would not warrant the defendant in not exercising with regard to him that care which it would exercise with regard to any other person, whom it was aware was in a similarly dangerous position."

On the hypothesis just referred to and in the view we take of other phases of plaintiff's complaint, it is probably true that no issue of contributory negligence should have been submitted to the jury, but plaintiff's counsel asked no instruction to that end, and, so far as we can discover from the record, made no such point during the trial, but, on the contrary, requested instructions conditioning plaintiff's right of recovery upon Winfrey's having exercised ordinary care for his own protection. The case having been tried on the theory that Winfrey's contributory negligence would defeat plaintiff's recovery, and no suggestion having been made that that theory was inapplicable to any one or more phases of the case, we cannot hold that the mere instruction of the jury on that subject, independent of what was said in the instruction, was erroneous. If it was in fact erroneous, it was an error invited or acquiesced in, and, therefore not reviewable.

The Supreme Court in *Tweed's Case*, 16 Wall. 504, 516, 21 L. Ed. 389, said:

"Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

[8] It remains, therefore, to consider the assignment of error taken to the court's charge as made concerning contributory negligence, and especially to that particular part of it which told the jury that the same degree of care and prudence is required of a drunken man as of a sober man, without in the same connection telling them to consider the helpless condition of a drunken man.

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By referring to the charge as a whole on this subject, it will be seen that the court first dealt with the subject of defendant's liability for injury to a drunken passenger known by its agents to be in a dangerous position and helpless, in which the jury were told, in effect, that defendant would be liable notwithstanding the intoxication of the passenger if it failed to exercise toward him reasonable and ordinary care to prevent his injury. This fairly stated the law on the prominent phase of the case, and then, as if the minor phases of the case required instruction on the subject of contributory negligence, the court after properly defining it told the jury as follows:

"In considering the question of contributory negligence of the deceased, I charge you that a man cannot voluntarily place himself in a condition whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and thereby contribute to an injury to himself, and then require of one ignorant of his condition recompense therefor."

And then amplified and explained the proposition as hereinbefore stated.

The court studiously limited the application of its charge on this subject of contributory negligence to those "ignorant of the condition" of the drunken man. In other words, it obviously undertook to advise the jury what the law was, not respecting those who knew Winfrey's perilous plight concerning which it had already fully charged the jury, but respecting those who were ignorant of his plight, manifestly referring to the agents of the south-bound train who were charged with negligent conduct in operating their train which actually ran over and killed Winfrey. Treating this matter, therefore, as an independent subject of inquiry, based, not on the last clear chance theory which had already been considered, but upon the primary negligence of the agents of the south-bound train, we discover no error in the charge of the court in this particular. It was fully as favorable to the plaintiff as the facts and pleadings of the case warranted.

[9] A drunken man must be held to the consequences of that condition. Otherwise a premium is put upon misbehavior. If he, by voluntary rendering himself unable to care for himself, can invite injury and recover from another ignorant of his condition therefor, notwithstanding his own direct contribution to the cause of it, the sober and careful man is put to a disadvantage in such cases. This seems and is unreasonable.

Hutchinson, in his work on Carriers (volume 3, par. 1230), announces this rule:

"Intoxication does not per se constitute contributory negligence, but is a matter to be taken into consideration as bearing on the question whether the passenger has, by his own conduct, brought the injury upon himself. The law exacts from one who

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is voluntarily intoxicated the same degree of care and caution in voiding an exposure of his person to danger as it exacts from a sober person of ordinary prudence under like circumstances."

Beach, in his work on Contributory Negligence, par. 391, says:

"Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespasses, to enjoy the pleasures of intoxication *cum periculis*."

In *Trumbull v. Erickson*, 38 C. C. A. 536, 97 Fed. 891, 893, Judge Caldwell, speaking for this court, said:

"The authorities are uniform that the mere fact that a person, when injured, was intoxicated, is not in itself evidence of contributory negligence, but that it is a circumstance to be considered in determining whether his intoxication contributed to his injury. If it did, he cannot recover. If it did not, it will not excuse the defendant's negligence."

To the same effect are *Keeshan v. E. A. & S. Trac. Co.*, 229 Ill. 533, 82 N. E. 360, and *Vizacchero v. Rhode Island Co.*, 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

[10] Other assignments of error relate to the refusal of the trial court to give certain instructions to the jury which were asked by plaintiff's counsel. These requested instructions have all been carefully considered in connection with what was said to the jury in the main charge, and we fail to find in them any correct principle of law applicable to the case under the pleadings and proof which was not fully covered in the charge. There was therefore no error in refusing to give them in the language requested.

[11] An exception was taken to permitting a witness for defendant to testify that one of the plaintiff's witnesses was addicted to the use of morphine. Whether this fact could have been proven as an independent fact by way of impeachment of plaintiff's witness without having called his attention to it while on the stand may be questioned, but it is obvious that this possible deviation from correct practice was without prejudice to plaintiff's rights under the pleadings and proof as made.

Finding no prejudicial error in the proceedings below the judgment is therefore affirmed.

SPRINGER *v.* PULLMAN CO.

(Supreme Court of Pennsylvania, Jan. 2, 1912.)

[83 Atl. Rep. 98.]

Carriers—Baggage—Care Required.*—Where baggage is delivered into the possession of a carrier, it becomes an insurer against all loss, except such as results from the act of God or the public enemy, but for the loss of personal effects which a passenger retains in his own possession while occupying a berth in a sleeping car the carrier is only liable for negligence.

Carriers—Sleeping Car Company—Loss of Personal Effects.—Plaintiff, on entering defendant's car, placed a grip containing valuable personal effects under his berth, and, when he awakened next morning, the grip was missing. When he retired, the upper berth

*See extensive note, 23 R. R. R. 215, 46 Am. & Eng. R. Cas., N. S., 215; extensive note by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1; extensive note, 40 R. R. R. 278, 63 Am. & Eng. R. Cas., N. S., 278 (articles on person or in custody of passenger); *Nelson v. Illinois Cent. R. Co.* (Miss.), 39 R. R. R. 114, 62 Am. & Eng. R. Cas., N. S., 114 (railroad's liability for loss of hand baggage of passenger carried with him on sleeping car of sleeping car company); *Sperry v. Consolidated Ry. Co.* (Conn.), 23 R. R. R. 499, 46 Am. & Eng. R. Cas., N. S., 499 (care required of street railway with respect to passenger's baggage); *Charlotte Trouser Co. v. Seaboard A. L. Ry. Co.* (N. Car.), 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459; *Brick v. Atlantic C. L. R. Co.* (N. Car.), 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629; *McKibbin v. Wisconsin Cent. Ry. Co.* (Minn.), 23 R. R. R. 495, 46 Am. & Eng. R. Cas., N. S., 495 (where traveler does not go on same train as baggage); *Wolf v. Grand Rapids, etc., Ry.* (Mich.), 27 R. R. R. 79, 50 Am. & Eng. R. Cas., N. S., 79; *Pullman Company v. Green* (Ga.), 25 R. R. R. 66, 48 Am. & Eng. R. Cas., N. S., 66 (care required of sleeping car company to guard against theft); *Sanders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; *Nashville, etc., R. Co. v. Lillie* (Tenn.), 10 R. R. R. 590, 33 Am. & Eng. R. Cas., N. S., 590 (carrier not insurer of hand baggage in day coach); *Wood v. Maine Cent. R. Co.* (Me.), 9 R. R. R. 721, 32 Am. & Eng. R. Cas., N. S., 721 (where passenger did not accompany his baggage); *Battle v. Columbia, etc., R. Co.* (S. Car.), 14 R. R. R. 425, 37 Am. & Eng. R. Cas., N. S., 425 (liability in absence of negligence); *Nashville, etc., R. Co. v. Lillie* (Tenn.), 10 R. R. R. 590, 33 Am. & Eng. R. Cas., N. S., 590 (railroad insures hand baggage placed by passenger under berth in sleeping car); *Blackmore v. Missouri Pac. R. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 360; *Kansas City, etc., R. Co. v. McGahey* (Ark.), 7 Am. & Eng. R. Cas., N. S., 767 (liability as warehouseman); *Bader v. Southern Pac. Co.* (La.), 17 Am. & Eng. R. Cas., N. S., 60 (baggage stored for transportation); *Whicher v. Boston & A. R. Co.* (Mass.), 18 Am. & Eng. R. Cas., N. S., 325 (when in custody and control of passenger); *Toledo O. C. R. Co. v. Bowler & Burdock Co.* (Ohio), 19 Am. & Eng. R. Cas., N. S., 579 (merchandise wrongfully shipped as baggage), *Southern Kansas Ry. Co. v. Clark* (Kan.), 2 Am. & Eng. R. Cas., N. S., 460.

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in his section was unoccupied, but was occupied during the night by a passenger who left the car at an intermediate point while plaintiff was asleep. There was no evidence explaining how the grip disappeared, and the only evidence of negligence was that of another passenger that, when he boarded the train after plaintiff had retired, the porter was on the platform, and later during the night he saw the porter in the washroom of the car. There was no proof, however, that while the porter was absent his post was not filled by the conductor. Held insufficient as a matter of law to show actionable negligence.

Appeal from Court of Common Pleas, Allegheny County.

Action by Carl Springer against the Pullman Company to recover the value of certain personal baggage lost from a sleeping car in transit. Verdict for plaintiff for \$2,000, and defendant appeals. Reversed.

Argued before FELL C. J. and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Richard H. Hawkins and *Howard T. Wilcoxon*, for appellant.

Churchill B. Mehard, *W. H. Falls*, and *Samuel S. Mehard*, for appellee.

STEWART, J. The damages here sought to be recovered are not for loss of baggage which the passenger had intrusted for transportation to the carrier's exclusive possession, but for the loss of personal effects which the passenger retained in his own possession while occupying a place in the sleeping car. The distinction with respect to the carrier's liability in the two cases is well established.

[1] In the one where the baggage is delivered into the possession of the carrier, the carrier becomes insurer against all loss, except such as results from the act of God or the public enemy; in the other, liability only attaches when the loss is shown to have resulted from the carrier's negligence in failing to use reasonable care in the protection of the passenger's property. This distinction is too familiar to require any citation of authorities in its support. It results from this established rule of law that mere proof of loss of baggage which is taken by a passenger into a sleeping car does not make out either an absolute or prima facie case of liability against the car company. Our own case of *American Steamship Company v. Bryan*, 83 Pa. 446, although the action there was against a steamship company, while here it is against a sleeping car company, is quite as illustrative of the principle as any of the cases called to our attention, and more authoritative here since it is an adjudication of our own court. In that case the claim was for loss of personal luggage which the passenger had not intrusted to the steamship company, but which he had taken with him into his stateroom, and which had been stolen therefrom. On the trial of the case the jury was instructed

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that the company, with respect to this particular luggage, was not responsible as common carrier—that is to say, insurer—but was answerable only for negligence; and the one question in the case was whether the company had exercised the ordinary care and caution which it owed to its passengers. This court on review of the case entered into a full and careful consideration of the evidence to determine the one question whether there was any evidence of negligence—that is, want of reasonable care and diligence—that warranted a submission to the jury; and the final determination of the case rested on that one question alone. In the latest New York case on the subject—*Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616—the court puts the liability of the steamboat company in such cases on the same footing with that of the innkeeper, distinguishing the carriage by the steamboat company from that by sleeping car, but that only gives greater emphasis to what was decided in *American Steamship Co. v. Bryan*, supra. If in Pennsylvania we apply to steamship companies a rule which holds them liable only for loss of luggage through negligence on their part, for so much the greater reason should the rule apply to sleeping car companies. Now what are the facts in this case?

[2] The plaintiff, having secured in New York City his transportation over the Pennsylvania Railroad to New Castle, Pa., purchased a lower berth in one of the Pullman sleeping cars which went to make up the train on which he proposed to travel. When entering this car at Jersey City he was carrying two pieces of luggage, a suit case and a satchel. The latter contained personal jewelry which he valued at \$2,203, and wearing apparel of the value of \$63.50. Both pieces of luggage he gave to the porter, who placed the suit case underneath the seat occupied by the plaintiff, and the satchel on the seat, because too large for the space under the seat. Plaintiff retired about the time the train reached Trenton. Before retiring, he opened and examined the satchel, found its contents safe and undisturbed, and then placed it under the berth as far as it would go. Its size preventing it going entirely under the seat, he left it protruding in the aisle; but to what extent does not appear. Plaintiff testified that he soon thereafter fell asleep and remained asleep until the train next morning was approaching Greensburg, when he arose to find that the satchel was missing. Having been continuously asleep, he knew nothing as to occurrences during the night. When he retired at Trenton, the upper berth in his section was unoccupied, and not made up. He was informed the next morning by the porter that this had been occupied by a passenger who must have got abroad at an intermediate point after plaintiff had gone to sleep, and who had evidently left the car at an intermediate point while plaintiff was asleep; for it was unoccupied when plaintiff

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awaked. Diligent but unrewarded search was made for the satchel through the entire car; all the baggage in the car undergoing examination. Plaintiff himself testified to no fact or circumstance which could in the remotest way explain the disappearance of the satchel. If the case rested on his testimony alone, it could hardly be contended that there was sufficient evidence of negligence to warrant a submission to the jury, except as we were to apply the rule of *res ipsa loquitur*, which, in effect, would be to hold the company an insurer against theft. From his own testimony it appears that the company adopted the same precaution against loss of luggage which like companies everywhere adopt. It had placed in charge of the car a conductor and a porter whose duty it was to be watchful and vigilant. The testimony of plaintiff does not suggest a suspicion that either of these appropriated the satchel, nor for that matter does any of the evidence, nor does plaintiff's own testimony, involve either in any negligence whatever.

On this branch of the case we have the testimony of a single witness. When the train reached Philadelphia, a Mr. Patterson, an acquaintance of plaintiff, became a fellow passenger, occupying the berth immediately opposite the plaintiff's. It is the testimony of this witness that is relied upon as showing negligence on the part of the porter. His testimony adds nothing by way of explaining how or in what manner the satchel disappeared. The sole purpose for which it was offered was to show that the porter had not been continuously and uninterruptedly in the aisle of the car or some corresponding position where he could have had a view of the car from the one end to the other between Jersey City and Greensburg. The witness testified that when he boarded the train at Philadelphia, as he recalled the circumstances, he gave his grip to the porter, who was then on the platform. He was asked if he had any recollection of seeing the porter elsewhere during the night, and he replied: "Why, I believe in the washroom." This question followed: "Do you remember seeing him more than once?" The answer was: "No; I do not." Outside this testimony there is absolutely nothing in the case upon which a charge of negligence could rest. The evidence that in the morning the passenger's shoes were found to have been polished during the night does not connect the porter with the polishing, and if it did, it fails to show that, when he polished them, he was not in the place where he could have had a full view of the car. Were we to concede, which we cannot, that reasonable care and vigilance to protect against loss of baggage requires that the porter should throughout the entire route be standing as sentry in the aisle of the car, or constantly moving back and forward through the car as guard or watchman, even then the testimony of Mr. Patterson would be insufficient to establish negligence. The negligent act relied on must have some

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relation to the loss, and it must appear to have been the proximate cause. Was the jury to be left to infer that plaintiff's satchel was stolen while the porter was on the platform at Philadelphia admitting passengers to the car, or to infer that it was stolen while he was in the washroom? The length of time the porter was in either place does not appear. For all that does appear, it may have been but momentarily. Not only so; but, as against an intruder, it was quite as much a protection to passengers for the porter to be on the platform with the rear door of the car fastened, as it would be were he in the car. If the rear door were unlocked when this occurred, it was for the plaintiff to show the fact. Plaintiff testified that besides the porter there was a Pullman conductor on the car. Was the jury to be left to infer that, while the porter was on the platform or in the washroom, no employee of the company was exercising surveillance of the car? The witness Patterson must have encountered the conductor as well as the porter. If his testimony was introduced to show negligence because of the porter being on the platform when he entered the car, why was he not interrogated as to conditions inside the car with respect to watchfulness and supervision when he entered it? We may not presume negligence on the conductor's part, and yet the porter being subordinate to him, if it were negligence in the porter to be on the platform, it would be the conductor's negligence in permitting it, except as he took upon himself the duty of the porter within the car. Can there be any reasonable inference from the evidence that he did not do so? In the case of *American Steamship Co. v. Bryan*, supra, the facts which were adjudged sufficient to warrant a submission of the question of negligence were much stronger than we have here, and yet two of the judges dissented from the decision of the court. In that case it was shown that, under the rules of the company, a watch was kept during the night in the saloon of the boat by the stewards or waiters taking turns. To secure their vigilance, they were required to report every hour to the officer on deck, and, of course, for this purpose they had to leave their posts. The court held that it was a question for the jury to say whether this amounted to ordinary vigilance which the company owed the passengers, inasmuch as the watchmen might be expected to take some time to make such report, "to loiter on their way, to stop and have a few words with the officer about the weather and the speed of the vessel." It there appeared that on the morning the larceny was committed the steward had stopped on his way at the cook's galley, and there drank a cup of coffee. "There was ample time in the interval as the fact showed," says Mr. Justice Sharswood, in his opinion, "for some one to enter the stateroom of the plaintiff and other passengers and carry off several valises." Was this ordinary and proper diligence? he inquires; could not some other mode

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have been adopted of watching the watchmen than this which might leave the saloon entirely unguarded at considerable intervals? No such questions arose in this case. Not only was there no evidence here as to the length of time the porter was absent from his post, or that when absent his post was not filled by another, but no question was made as to the rules, regulations, and requirements of the company being entirely sufficient to meet the requirements of ordinary care. The only negligence asserted was that of the porter in having been seen once in the washroom and once when the car was at rest upon the platform.

In view of all the facts of the case, it seems impossible that the theft, for theft it undoubtedly was, was committed by an intruder. The person who took the satchel must have been either a passenger or an employee. It could hardly have been one of the latter class, since their attention had not been called in any way to the fact that the satchel contained valuables of any sort. Why should one of them without opportunity of knowing the contents select for plunder the one satchel in the room that carried such rich treasure? We may assume from the unusual value of its contents that this satchel was the richest, and, so far as appears, it was the only one disturbed. The evidence affords a more reasonable explanation. It does not appear how many passengers left that car that night at the intermediate stopping places; but the evidence shows that some did. To any one so leaving the car the plaintiff's satchel was exposed, since it protruded into the aisle. Certainly such a one had larger opportunity to take the satchel, and escape with it undetected than any passenger who remained in the car, or any servant; and the evidence to our mind makes it most likely that it was taken in this way. If it was so taken, will it be contended that that was an occurrence which ordinary vigilance on the part of the company would have prevented? To so hold would be to impose on the company the duty of seeing that no passengers left the car with any baggage except his own, which again would be virtually making the carrier an insurer, besides subjecting the passengers to a scrutiny and surveillance which the ordinary traveler would have a right to resent. We cannot think that the ordinary care exacted of the carrier requires any such officious interference as this. On the whole, we are of opinion that the evidence of negligence as the proximate cause of the plaintiff's loss was not sufficient to warrant a submission of the case to the jury. As the case was submitted the jury was left to conjecture that which the plaintiff was required to prove. This being our conclusion, it is unnecessary to consider and decide the several other questions which have been raised. The second specification of error complains of the refusal of the court to enter judgment non obstante.

This assignment is sustained, and the judgment is accordingly reversed.

AUSTIN et ux. v. WASHINGTON WATER POWER CO.

(Supreme Court of Washington, May 24, 1912)

[123 Pac. Rep. 775.]

Carriers—Passengers—Care Required.*—A street car company is bound to exercise toward its passengers the highest degree of care consistent with the successful operation of its business.

Carriers — Passengers—Negligence—Proximate Cause.—Evidence that a street car company ran its car at an excessive rate of speed and of concurrent injury to a passenger was sufficient to make it a jury question whether the excessive speed caused the injury.

Carriers—Passengers—Injuries—Jury Question—Cause of Accident.—Evidence held to make it a jury question, in a street car passenger's action for personal injuries by being thrown against the rear of the car, whether plaintiff was thrown against the end of the car by its excessive speed while going around a curve.

Department 1. Appeal from the Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by W. R. Austin and wife against the Washington Water Power Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded for new trial.

Nuzum & Nuzum and *Geo. H. Armitage*, all of Spokane, for appellants.

Post, Avery & Higgins, of Spokane, for respondent.

FULLERTON, J. The respondent owns and operates a street car system in the city of Spokane. In the evening of September 25, 1909, the appellants entered a car of the respondent for the purpose of riding as passengers from the business center of the city to their home in the suburbs thereof. The car was so crowded with passengers that the appellants were unable to obtain seats and rode standing in the vestibule of the car with some 15 other persons. The appellant Martha E. Austin stood at the extreme rear of the car next the controller with her left side or hip against it. As the car proceeded on its way, it rounded a curve in passing from one street into another running at right angles thereto. In making the turn the people in the vestibule in front of Mrs. Austin were thrown back against her, pressing her against the controller and injuring her.

*See extensive note, 1 R. R. R. 42, 24 Am. & Eng. R. Cas., N. S., 42; third foot-note of *Denver City Tramway Co. v. Hills* (Colo.), 41 R. R. R. 505, 64 Am. & Eng. R. Cas., N. S., 505; first foot-note of *Louisville Ry. Co. v. Wilder* (Ky.), 41 R. R. R. 148, 64 Am. & Eng. R. Cas., N. S., 148.

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The allegation in the complaint with reference to the cause of the injury was as follows: "That the plaintiff Martha E. Austin was standing with her back next to the controller on said car in said rear platform, as aforesaid, and that when the said car of said defendant corporation rounded the turn at the corner of Division street and Riverside avenue, the said defendant corporation, through its agents and servants, the motorman and conductor on said car, so carelessly and negligently managed said car that the same was taken around said curve at an excessive rate of speed, thereby causing the crowd in the vestibule of said car to surge backward, and against the plaintiff Martha E. Austin, throwing the said Martha E. Austin against the controller on said car, the said controller striking her in the back over the sacrum and injuring the plaintiff, Martha E. Austin, as herein-after alleged."

At the trial Mrs. Austin gave the following account as to the manner in which the injury occurred: "Q. When you got to Riverside and Division, Mrs. Austin, just as the car hit the curve, how fast was the car going? A. Well, it was going faster than when I had rode when it was loaded so. Q. Faster than what? A. Faster than I had rode on, loaded so. Q. When you hit the curve, what, if anything, happened with the crowd? A. Well it threwed them all back onto me and jammed me against the controller. Q. Are you able to state what occurred to you when you hit the controller, Mrs. Austin, with reference to going backwards, or anything of that sort, or do you know what occurred? A. After I had fell I didn't know much of anything; didn't know anything from then until I found myself laying on the ground at Nora." Her husband and coplaintiff gave the following account as direct examination: "Q. Now, Mr. Austin, when you got up Division street, what was the speed of the car? A. Why, I should judge about 10 or 12 miles an hour from the way it was going. Q. And when you hit the Division street curve, or came into it, what, if anything, happened to the car? A. Well, they hit the curve with such force, when the hind trucks hit the curve it swung the car around with such force, it throwed all of us, standing in the back end, backward and jammed my woman across the controlier. There was two or three men in front of her that came back against her." Cross-examination: "Q. And you say that when the hind trucks of that car struck the curve at Division street, that then the whole crowd in the vestibule went back, pushing your wife on the controller? A. Yes, sir. Q. At that particular moment? A. Yes, sir."

At the conclusion of the appellants' case in chief, the trial judge granted a motion for a nonsuit on grounds stated by himself in the following language: "Gentlemen of the jury, on yesterday when the plaintiffs closed their testimony, the defendant

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challenged the sufficiency of plaintiffs' evidence and moved for judgment. I didn't rule upon that motion at that time, but reserved ruling until this morning. The ground of that motion was that under natural law of falling bodies it would be impossible for the testimony of Mr. and Mrs. Austin to be true, namely, that the car going at great speed around a curve would throw the persons, passengers standing upon the rear platform, back; the defendant contending that the natural law would be that those persons standing upon the rear platform would go to the side. As I say, I reserved ruling upon that motion until now. Last evening, after the adjournment of court, the plaintiff, some of his witnesses, attorneys for both sides, myself, and some others, made an experiment upon one of the cars around this corner, and since then I have myself made other experiments upon other car lines, and in addition have consulted with a teacher in physics in the high school, and I am convinced, beyond all doubt, from these experiments, and this information, that the natural law is as contended for by the defendant; that is to say, that a body would fall to the side, and not to the rear, when a car was moving rapidly around a corner, as is alleged in the pleadings, and as is shown by the evidence. For that reason I shall have to grant this motion to the defendant, and enter judgment for the defendant in this case." Judgment to the effect that the appellants take nothing by their action and for cost in favor of the respondent was thereupon entered. This appeal followed.

It will be noticed from the remarks of the trial judge which we have quoted that he does not deny that the appellant was injured in the manner alleged in her complaint, that is to say, by the persons standing in the vestibule of the car in front of her surging back upon her; nor does he deny that it was an act of negligence of the respondent to run its car around the curve at a speed of 10 or 12 miles per hour; but holds rather that there is no relation between the injury suffered and the negligence alleged and proven, that by the laws of physics it is an impossibility for a person riding in a car around a curve to be thrown backwards towards the rear end of the car, but, on the contrary, a person so riding would be thrown towards the side of the car in the direction of the car's original motion.

[1-3] We cannot accept this theory as conclusive against the appellants' right to recover. The respondent is a quasi public corporation engaged in the business of carrying passengers for hire. It is bound to exercise towards its passengers the highest degree of care consistent with the successful operation of its business. The injured appellant was a passenger on one of its cars, and while so a passenger the respondent ran its car at an excessive rate of speed, and concurrent therewith the appellant mentioned was injured. These facts alone, it seems to us, suffi-

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ciently connect the negligent act and the injury to require the submission of the question whether the one was the cause of the other to the jury. But if it were otherwise, we cannot think the court's reasoning scientifically accurate. It may be that if a street car should proceed in a straight line to the junction of a street, turn suddenly a quarter of the way around as if on a pivot, and stop, the passengers therein would be thrown towards the side of the car in the direction in which the car was going prior to making the turn. But this car did not perform in that manner. On reaching the curve there was no stop or slacking in its speed. It proceeded on in a new direction. The passengers were acted upon, as it were, by two forces, the one in the direction of the original motion of the car, and the other opposite to the changed direction of the car, and under natural laws they would be thrown in some direction which is the resultant of these two forces; that is, neither directly to the side of the car nor directly backwards, but in some direction diagonally between the two. "Two or more forces may act on a body at the same time. * * * In such cases each force produces an acceleration independently of the action of the other forces, and the body travels in some path with a definite acceleration, which is the resultant of the accelerations produced by the separate forces." Duff's A Text-Book of Physics. This being true, it is of course not impossible that a woman standing at the back end of a crowded car could be hurt by having other persons who occupied a more forward position in the car thrown against her as the result of an excessive speed of the car around a curve.

But consideration of this kind, however applicable they may be when the action of inanimate objects is the subject of inquiry, have but little application to the conduct of human beings under similar conditions. Unlike inanimate objects, human beings have a power of motion independent of the motion of the car in which they are riding, and constantly exert this power of motion when riding to keep themselves in adjustment with the changing movements of the car. The effect a given condition would have upon an inanimate object riding in a car is not therefore a very satisfactory test with which to measure the effect of the condition upon human beings. It could be possible, and indeed it is more than probable, that the action of a number of inanimate objects, say boxes or barrels, carried swiftly around a curve, would be altogether different from that of a number of human beings carried around the same curve; that while the one in obedience to the law of natural forces would be thrown in a direction diagonally to the side and rear of the car, the other might be thrown directly to the rear, owing to the independent force put forth by them to regain an equilibrium lost by the changing direction in the forward movement of the car. It does not follow therefore that, because an injured passenger alleges an

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improbable ground as the cause of his injury, when tested by the action of inanimate objects, that it is an improbable ground when the conduct of persons is the subject of the inquiry.

We think the judgment should be reversed, and the cause remanded for a new trial. It is so ordered.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur.

MILLETT v. NEW YORK, N. H. & H. R. R.

(Supreme Judicial Court of Massachusetts, Suffolk, May 20, 1912.)

[98 N. E. Rep. 574.]

Carriers—Persons Alighting from Train—Death—Nature of Relation—Passenger.*—Decedent started on a return journey to his home, requiring a change of train at M., with mileage books in his pocket, containing coupons sufficient and available for the entire distance. The conductor detached coupons covering his fare to M., and, on arrival there, the engine was uncoupled, leaving the car in which deceased was standing on the north-bound track opposite the station. Between that and the station was the south-bound track, which passengers had to cross to take a train to decedent's destination. This train was due to arrive one or two minutes after the arrival of the train on which decedent reached M., but was four or five minutes late. Decedent remained in the car in momentary expectation of the arrival of the other train, and on its arrival left to board it. As he stepped down to the south track, he was struck by the engine of the train that had brought him to M., which was backing down on the south track and killed him instantly. Held, that deceased, when struck, was still a passenger.

Carriers—Carriage of Passengers—Personal Injuries—Negligence.†—Where a passenger, as he was alighting from a car at a junction at a station where he was required to cross an intervening track to

*See extensive note, 42 R. R. R. 351, 65 Am. & Eng. R. Cas., N. S., 351.

†For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to their passengers struck by trains of street cars while crossing tracks between depots or other stopping places and their trains or cars, see first foot-note of *Creamer v. Louisville Ry. Co. (Ky.)*, 40 R. R. R. 62, 63 Am. & Eng. R. Cas., N. S., 62; *Washington, etc., Ry. Co. v. Vaughan (Va.)*, 39 R. R. R. 444, 62 Am. & Eng. R. Cas., N. S., 444; *Atlantic City R. Co. v. Clegg (C. C. A.)*, 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; second foot-note of *Columbus Ry. Co. v. Asbell (Ga.)*, 38 R. R. R. 22, 61 Am. & Eng. R. Cas., N. S., 22; first paragraph of first foot-note of *Atchison, etc., Ry. Co. v. McElroy (Kan.)*, 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487, where all those preceding it are collected.

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get to his train, was struck and killed by the engine of the train that had brought him to the junction backing down on the intervening track at a speed of eight to ten miles an hour, without any warning by whistle or bell, and it was known that passengers would have to cross the track to get to the station, the carrier was negligent.

Report from Superior Court, Suffolk County; Wm. F. Dana, Judge.

Action by Henry Q. Millett, as administrator of Willis C. Crowell, against the New York, New Haven & Hartford Railroad. A verdict was directed for defendant, and plaintiff excepted, and case was reported. New trial.

Chas. Wood Bond and John J. Hughes, both of Boston, for plaintiff.

John L. Hall, of Boston, for defendant.

MORTON, J. This is an action of tort to recover for the death of the plaintiff's intestate while a passenger on the defendant's railroad. The action is brought under R. L. c. 111, § 267, and the declaration is in two counts. The first count alleges negligence on the part of the defendant and the second the unfitness or gross negligence of its servants or agents. At the close of the evidence the presiding judge directed a verdict for the defendant, and reported the case: "If the plaintiff should have been permitted to go to the jury a new trial to be ordered, otherwise judgment to be entered for the defendant."

The questions are whether the deceased was a passenger at the time of the accident, and whether, if so, there was evidence of negligence on the part of the defendant.

The plaintiff does not contend that there was any evidence warranting a finding that the accident was caused by the unfitness or gross negligence of the defendant's servants or agents. The question of due care on the part of the deceased is not involved. *Commonwealth v. Boston & Lowell R. R.*, 134 Mass. 211.

[1] The accident occurred March 14, 1906. The deceased was a traveling salesman and lived in Sharon. He left his home on the morning of the day of the accident to go to Fall River in the course of his business, expecting, as there was evidence tending to show, to return between 6 and 6:30 p. m. He transacted his business in Fall River and took a train for Sharon which left Fall River at 5:04 p. m. The train went no farther than Mansfield, and was due there at 5:45 p. m. At Mansfield he had to change and take a train on the Providence division on the other side of the station. He had in his pocket mileage books of the defendant company, and from one of these the conductor detached coupons which covered his fare from Fall

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River to Mansfield. The books were equally available from Mansfield to Sharon. The train that left Fall River arrived at Mansfield on time. The engine was uncoupled from the train, leaving the car in which the deceased was standing on the track opposite to the station. The track on which the car stood was the north-bound track. Between that and the station was the south-bound track which passengers had to cross to reach the station and take trains on the Providence division. The train from Providence was due at Mansfield within a minute or two after the arrival of the train from Fall River. On the afternoon of the accident it was between four and five minutes late. The evidence would warrant a finding that the deceased remained in the car in momentary expectation of the arrival of the train from Providence, and on its arrival left the car for the purpose of taking the train to Sharon. As he stepped down on to the south-bound track, he was struck by the engine of the train that had brought him to Mansfield, which was backing down, and was instantly killed.

We think that there was evidence warranting a finding that the deceased was a passenger at the time of the accident. He was on his way from Fall River to his home in Sharon. The mileage books in his possession operated as a prepayment of his fare when the necessary coupons were detached. He had not arrived at his destination. The station at Mansfield was an intermediate station where he was to connect with the train that would take him to Sharon. So far as appears no notice or warning was given to him to leave the car, and the car itself was left standing opposite to the station where the train stopped when it arrived at Mansfield. It could have been found that he remained in the car without any objection from the defendant's servants or agents, in momentary expectation of the arrival of the connecting train, with the intention of proceeding by that train in continuation of the journey which he had begun until he arrived at his destination. Assuming that the same rule in regard to leaving the train applies to a passenger over connecting lines operated by the same company, when he arrives at the intermediate station where the connection is to be made, that applies to a passenger arriving at his destination, the question is ordinarily one of fact for the jury under suitable instructions, whether, in leaving the train when and as he did at the intermediate station to take the connecting train, the passenger was, taking all the circumstances into account, within his rights as such passenger or had ceased for the time being to be a passenger. We see nothing in the case before us to take it out of the rule thus stated. In *Heinlein v. Boston & Providence R. R.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676, there was no dispute as to the facts or the inferences to be drawn from them and the relation of the plaintiff to the defendant as an intending passenger had ceased.

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[2] We also think there was evidence of negligence on the part of the defendant. There was evidence tending to show that without any warning being given or whistle blown or bell rung, the engine was backed down at a speed of eight to ten miles an hour over a track which it was known passengers would have to cross to get to the station. This would justify a finding of negligence on the part of the defendant.

In accordance with the terms of the report there will be a new trial.

So ordered.

ILLINOIS CENT. R. CO. *v.* FLEMING.

(Court of Appeals of Kentucky, May 17, 1912.)

[146 S. W. Rep. 1110.]

Carriers—Carriage of Passengers—Nature of Ticket.*—As between the passenger and the carrier, a ticket is a mere memorandum of the contract of transportation, the real terms of which are entered into before the delivery of the ticket; but, as between the passenger and the conductor, the ticket is considered as evidence of the passenger's rights.

Carriers—Interstate Transportation—Offenses—Mistaken Date of Expiration on Ticket.—Where a carrier sells a return excursion ticket for interstate transportation at a rate duly scheduled and filed as required by the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), to expire on July 15th, the carriage of the passenger after July 12th, the mistakenly written expiration date of the ticket issued to the passenger, is not a violation of the Interstate Commerce Act, since the erroneous issuance of a ticket in terms not conforming to the actual contract does not make an unlawful contract.

*See foot-note of *Corley v. Southern Ry. Co.* (S. Car.), 42 R. R. R. 690, 65 Am. & Eng. R. Cas., N. S., 690; *Hayes v. Wabash R. Co.* (Mich.), 38 R. R. R. 511, 61 Am. & Eng. R. Cas., N. S., 511 (may be shown by parol that before ticket was issued the ticket agent guaranteed connection at certain place); *Levan v. Atlantic C. L. R. Co.* (S. Car.), 38 R. R. R. 36, 61 Am. & Eng. R. Cas., N. S., 36 (ticket agent's knowledge of right of passenger under a ticket, the passenger having asked for a ticket by one route and been given one by another route, and got on the train by the route for which he asked a ticket, is to be imputed to the conductor of the train); *Illinois Cent. R. Co. v. Gortikov* (Miss.), 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650 (certain provisions printed on ticket constituted mere advice); *McCullum v. Southern Pac. Co.* (Utah), 26 R. R. R. 265, 49 Am. & Eng. R. Cas., N. S., 265 (whether contracts in writing are expressed by railroad tickets); *Cincinnati, etc., R. Co. v. Harris* (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762 (actual contract between carrier and passenger governs, notwith-

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Appeal and Error—Harmless Error—Error Favorable to Party Complaining.—A party is not entitled to complain of error favorable to himself.

Carriers—Action for Breach of Contract of Transportation—Trial—Instructions.—Where a carrier, selling a return excursion ticket for interstate travel, by mistake issued to the passenger a ticket in its terms not conforming to the actual and lawful contract, but showing an earlier expiration date, plaintiff in an action for damages for the carrier's refusal to accept such ticket after the date shown on its face, but before the expiration of the contract for transportation actually made, was entitled to an instruction upon her rights against the carrier under the actual contract as well as under the contract evidenced by the ticket.

Carriers—Breach of Contract of Transportation—Action—Admissibility of Evidence.—In an action against a carrier for damages for its refusal to accept a return excursion ticket erroneously showing an expiration date earlier than that of the contract of transportation actually made, and for the humiliation resulting therefrom, evidence as to the purchase of the ticket was admissible as serving to make plain the real nature of the contract; and was also admissible even upon the view that the ticket was the only evidence of the contract between the parties.

Pleading—Form and Allegations—Matters of Evidence.—A petition pleading matters of evidence and unnecessarily burdening the record is not justified by the rules of code procedure.

Appeal and Error—Harmless Error—Defective Pleading.—A carrier defendant in an action for breach of its contract of transportation in which plaintiff set out in her petition a historical review of the whole matter pleading matters of evidence was not prejudiced thereby.

standing recitals of ticket, the ticket being but evidence of the contract); *Ames v. Southern Pac. Co.* (Cal.), 10 R. R. R. 551, 33 Am. & Eng. R. Cas., N. S., 551 (whether railroad ticket constitutes the transportation contract); *Crabtree v. Washington County Ry. Co.* (Me.), 24 R. R. R. 472, 47 Am. & Eng. R. Cas., N. S., 472 (admissibility of posters and advertisements purporting to limit use of tickets); *Pennsylvania Co. v. Loftis* (Ohio), 15 R. R. R. 850, 38 Am. & Eng. R. Cas., N. S., 850 (parole evidence to prove, aside from ticket sold, contract between carrier and passengers); *Rolfs v. Atchison, etc., Ry. Co.* (Kan.), 6 R. R. R. 920, 29 Am. & Eng. R. Cas., N. S., 920 (parole evidence of statement by ticket agent was inadmissible to vary written contract on ticket fixing time for its expiration); *Coine v. Chicago & N. W. Ry. Co.* (Iowa), 13 R. R. R. 316, 36 Am. & Eng. R. Cas., N. S., 316; note, 21 Am. & Eng. R. Cas., N. S., 148 (whether railroad tickets are contracts); *Walker v. Price* (Kan.), 20 Am. & Eng. R. Cas., N. S., 432 (parole evidence is not admissible to vary printed conditions as to time limit in round trip ticket); *Trezona v. Chicago G. W. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 104 (ticket conclusive evidence of passenger's rights).

For the authorities in this series on the question whether the mere acceptance of a railroad passenger ticket includes assent to its printed conditions, see first foot-note of *Sanden v. Northern Pac.*

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Carriers—Action for Breach of Contract of Transportation—Damages—Humiliation.†—In an action against a carrier for breach of its contract of transportation and its threat to eject plaintiff from the train, compensatory damages for the humiliation suffered are recoverable.

Carriers—Action for Breach of Contract of Transportation—Excessive Damages.†—A carrier in breach of its contract of transportation awoke a woman passenger at a late hour of the night, and told her that, if she did not pay her fare, she would be ejected from the train, and obliged her to have the porter endeavor to borrow money for her, and to offer to pledge her personal effects therefor, and to

Ry. Co. (Mont.), 41 R. R. R. 223, 64 Am. & Eng. R. Cas., N. S., 223; second foot-note of *Smith v. Southern Ry. Co.* (S. Car.), 40 R. R. R. 723, 40 Am. & Eng. R. Cas., N. S., 723; first foot-note of *Cincinnati, etc., Co. v. Harris* (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762; foot-note of *Ames v. Southern Pac. Co.* (Cal.), 10 R. R. R. 551, 33 Am. & Eng. R. Cas., N. S., 551, where all those preceding it are collected.

For the authorities in this series on the subject of the liabilities of carriers on account of ticket agent's and conductor's negligence or mistakes, or other misconduct, with respect to passenger tickets or checks, see extensive note, 38 R. R. R. 322, 61 Am. & Eng. R. Cas., N. S., 322; *Light v. Detroit & M. Ry. Co.* (Mich.), 42 Am. & Eng. R. Cas., N. S., 124.

For the authorities in this series on the subject of the duty of a conductor to consider the explanations of a passenger presenting a wrong or defective ticket, see extensive note, 38 R. R. R. 322, 61 Am. & Eng. R. Cas., N. S., 322; last paragraph of foot-note of *Corley v. Southern Ry. Co.* (S. Car.), 42 R. R. R. 690, 65 Am. & Eng. R. Cas., N. S., 690; fourth foot-note of *Smith v. Southern Ry. Co.* (S. Car.), 40 R. R. R. 723, 63 Am. & Eng. R. Cas., N. S., 723; first foot-note of *Marx v. Louisiana W. R. Co.* (La.), 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635, where all those preceding it are collected or referred to.

†See foot-note of *St. Louis, etc., Ry. Co. v. Brown* (Ark.), 40 R. R. R. 736, 63 Am. & Eng. R. Cas., N. S., 736; last foot-note of *St. Louis Southwestern Ry. Co. v. Hammet* (Ark.), 40 R. R. R. 702, 63 Am. & Eng. R. Cas., N. S., 702; foot-note of *Brenner v. Jonesboro, etc., Ry. Co.* (Ark.), 26 R. R. R. 229, 49 Am. & Eng. R. Cas., N. S., 229; extensive foot-note of *Choctaw, etc., R. Co. v. Hill* (Tenn.), 8 R. R. R. 776, 31 Am. & Eng. R. Cas., N. S., 776; foot-note of *Louisville & N. R. Co. v. Fowler* (Ky.), 29 R. R. R. 282, 52 Am. & Eng. R. Cas., N. S., 282.

‡For the authorities in this series on the question when punitive or exemplary damages are, and are not, recoverable against the carrier for wrongs to its passengers, see fifth foot-note of *Calder v. Southern Ry. Co.* (S. Car.), 42 R. R. R. 295, 65 Am. & Eng. R. Cas., N. S., 295; last paragraph of last foot-note of *Cincinnati, etc., Ry. Co. v. Rue* (Ky.), 40 R. R. R. 465, 63 Am. & Eng. R. Cas., N. S., 465; last foot-note of *Louisville & N. R. Co. v. Scott* (Ky.), 39 R. R. R. 466, 62 Am. & Eng. R. Cas., N. S., 466; *Chicago, etc., R. Co. v. Newburn* (Okla.), 39 R. R. R. 357, 62 Am. & Eng. R. Cas., N. S., 357; foot-note of *Tant v. Southern Ry. Co.* (S. Car.), 38 R. R. R. 592, 61 Am. & Eng. R. Cas., N. S., 592; foot-note of *Steedman v. South Carolina, etc., R. Co.* (S. Car.), 9 R. R. R. 627, 32 Am. & Eng. R. Cas., N. S., 627, where all those preceding it are collected.

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submit herself to the inspection of another passenger, that he might judge from her appearance whether he was warranted in advancing her the money necessary to pay fare. Held, that an award of \$750 for compensatory damages was not excessive.

Carriers—Action for Breach of Contract of Transportation—Exemplary Damages.—Where a conductor drew aside the curtain of a passenger's berth, put his lantern in her face, and in a rough and coarse voice told her that her ticket was not good, and that she would have to pay fare, and again rudely pulled the curtain aside when the passenger was only partly dressed, an award of \$250 punitive damages was justified.

Appeal from Circuit Court, Henderson County.

Action by Catherine Fleming against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Trabue, Doolan & Cox, of Louisville, *C. L. Sivley*, of Chicago, Ill., and *John L. Dorsey* and *John C. Worsham*, both of Henderson, for appellant.

Yeaman & Yeaman, of Henderson, for appellee.

WINN, J. In the summer of 1911 the appellee bought from the appellant at Evansville, Ind., the right of transportation to Chicago, Ill., and return. Her contract was upon a reduced excursion rate, which rate had been duly scheduled and filed as demanded by the interstate commerce statute. Her contract was for return passage not later than July 15th; but the selling agent, in supplying her with her ticket, the written memorial of her contract, by mistake furnished her with a ticket providing July 12th as the last return day. Together with a traveling companion who had purchased a like contract, appellee journeyed to Chicago. Upon the night of the 14th she presented herself at the Illinois Central ticket office in Chicago, where her ticket was stamped and validated in due form without any question about its expiration. Upon it she was admitted by the gatekeeper through the gate to the train shed. Her train was pointed out to her, and she boarded it. She went into the Pullman sleeping car, delivered her ticket to the porter, and retired. The train left Chicago on the 15th about 2:40 a. m. About daylight she was awakened by the conductor, who informed her that her ticket had expired, and that she would either have to pay fare or leave the train. She had not sufficient money, but succeeded in borrowing it from a stranger on the train, paid her fare, and was transported back to Evansville. Her companion, Miss Roberts, had a ticket with the same error in its return limit, had it validated in the same way, went upon the return train with her, delivered her ticket to the porter, and retired in the same sleeper berth. She, too, was awakened by the conductor, and the same demand made of

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her. She also came home on the money borrowed from the stranger. Mrs. Fleming brought her action against the railroad company for damages, charging that the conductor's conduct was course, insulting, and brutal, and had greatly humiliated her in the presence of the other passengers. She recovered a verdict of \$750 for compensatory damages and of \$250 for punitive damages. The railroad company appeals.

[1, 2] One defense interposed by the railroad company was that the ticket in possession of Mrs. Fleming by its terms expired on July 12th, and that, had it transported her upon that ticket, it would have been guilty of an infraction of the federal interstate commerce statute, and would have been subject to a federal prosecution accordingly. It seems clear to us that the learned counsel for the railroad company misconceive their facts. Mrs. Fleming was the beneficiary of no rebate or unusual privilege. She bought and paid for certain transportation at a certain price, the scheduled price, the lawful price, the price at which every other traveler desiring like service could have bought it. Unfortunately for the railroad company it blundered in the manner of ticket it supplied her, with the result that her written or printed ticket did not evidence the true contract. The doctrine generally received and generally fixed in Kentucky is that as between the passenger and the carrier the ticket is a mere memorandum of a contract, the real and true details of which are entered into before the delivery of the ticket. Upon the other hand, the ticket is customarily considered as evidence of the passenger's rights as between him and that servant of the railroad company known as the conductor of the train. *L. & E. Ry. Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209, 20 Ky. Law Rep. 516; *C. N. O. & T. P. Ry. Co. v. Carson*, 145 Ky. 81, 140 S. W. 71; *Southern Ry. in Ky. v. Hawkins*, 121 Ky. 415, 89 S. W. 258. Mrs. Fleming's contract as she actually made it with the railroad company was a lawful contract, bought at a rate which met every demand of the federal statute. If the carrier was guilty of any infraction of the federal law, it was guilty of such an infraction in delivering to her a ticket different from that for which she paid. It committed no offense in entering into the lawful contract with her. In any attempted prosecution against it for carrying her on to her destination upon a ticket which (supposedly) had expired, it cannot be questioned but that the railroad company could have successfully protected itself by showing what the true contract was, what was the true consideration paid, and that it in every respect had conformed to its tariff schedule. Upon the other hand, it goes as well without saying that, were it indicted charged with selling to Mrs. Fleming the ticket with the earlier expiration date which it delivered to her at the price which it exacted for the ticket, it could have protected itself by showing that the contract actually made with her in every way complied with the statute. In other words,

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the truth and the justice of the situation would intervene in either supposed case to protect the carrier from the federal prosecution, the fear of which was urged strongly in the argument of the case. It is to be conceded that neither the carrier nor the passenger can make a lawful contract which violates the provisions of the federal law demanding equal accommodations and equal privileges and equal rates to all; but the mistaken issual of a ticket, in its terms not conforming to the true, the lawful, contract, does not make an unlawful contract; for the ticket as between the passenger and the carrier is not the sole evidence of the contract; nor, we undertake to say, would it so be considered in a federal prosecution. It was much argued upon the hearing that it would be a great hardship upon the carriers of the country to subject them to prosecutions in cases like this; but that argument seems to us to overlook as well the prosecutions to which the railroad company might subject itself if the ticket were held to be the sole evidence of the contract by mistakes made just in such cases as this. If, for instance, the agent had mistakenly sold this ticket with a time limit of July 25th, instead of July 15th, the contract date, at the tariff rate for tickets expiring on July 15th, would the carrier then, however innocent its mistake in fixing the return date, feel that it was justly punished in a federal prosecution for selling a ticket not authorized by the tariff? The question answers itself. We are not inclined to visit upon the railroads of the state any construction that would be so harsh and so unjust. Upon the other hand and as between the carrier in this case who wrote the contract and the passenger who purchased it, the mistake was that of the carrier; and, if one or the other must suffer for that mistake, the sufferer should be the one who made it.

The foregoing discussion in reality is not pertinent to this case if the instruction given by the trial court be accepted as the correct exposition of the law.

[3. 4] By that instruction the jury were told that as a matter of abstract right it was the duty of the conductor to disregard the ticket and require Mrs. Fleming to pay her fare, or in the event of her refusal to do so to require her to leave the train, and that the defendant was not liable in damages therefor. In other words, the ticket presented was treated by the trial court as the absolute, final, and only evidence of the contract between the parties and upon it based the conductor's duty to expel Mrs. Fleming from the train in case she did not pay again. The instruction then proceeded to permit a recovery for damage only in the event that the conductor had been rude and offensive in manner, and had demeaned himself in a way calculated to humiliate Mrs. Fleming. We do not think this was a correct exposition of the law, but the error was in favor of, and not against,

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the appellant. The appellee was entitled to have the jury instructed upon her rights with relation to the railroad company, and not upon the somewhat narrower relation of the conductor's duty upon the erroneous ticket contract.

[5] The testimony about the purchase of the ticket and the like, the admission of which is made a subject of complaint by appellant, was not erroneous even upon the view adopted by the trial court, because it was necessary to enable the trial court to find upon what its instruction should be based. Upon our view of the case the evidence was equally competent because it served to make patent the true nature of the contract.

[6] The plaintiff pleaded her evidence, and complaint is made of that fact. A historical review of the whole matter was stated in the plaintiff's petition. It unnecessarily burdened the record and was not justified by the familiar rules of our code procedure.

[7] However, there was nothing in this manner of pleading to prejudice any right of the appellant.

[8, 9] It is complained that the award of \$750 for compensatory damages is excessive. It is well settled in this state that mortification and humiliation are the objects of compensation in a case like this. Mrs. Fleming was traveling in the nighttime. She was awakened in the late hours of the night, and told that, if she did not pay her fare, she would be ejected from the train. This must have humiliated her greatly. She had to have the porter seek to borrow money for her, and to offer to pledge her personal effects to get money to save being ejected from the train. She had to submit herself to the inspection of strangers, and especially to that of the one who in the end was good enough to help her. He especially asked that he might look at her in order to judge from inspection whether her face bore such evidence of character as to warrant his extending her the accommodation. It is difficult to say just what will compensate a given person for going through any particular unfortunate experience of this nature. The few facts recounted suffice to show that Mrs. Fleming's surroundings were humiliating in the extreme; and we are not prepared to say that for such shame as she suffered the amount of \$750 is unreasonable.

[10] Complaint is likewise made of the \$250 award of punitive damages. Mrs. Fleming testified, in substance, that the conductor unbuttoned the curtain of her berth, put his lantern in her face, and in a rough, ungentlemanly, and coarse voice told her that the ticket was no good, and that she would have to pay her fare; that again, when she had just had time to take off her nightdress, the conductor rudely pulled the curtain aside, and exhibited her only partly dressed. If these facts are true, if the conductor jerked aside the curtain and exhibited the appellee in a half-dressed condition to the other passengers in the car, or

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even to the eyes of the conductor himself, he was guilty of conduct such as to justify the instruction upon, and this small award of, punitive damages.

For the reasons given, the judgment of the trial court is affirmed.

NORFOLK & ATLANTIC TERMINAL CO. *v.* ROTOLO.

(Circuit Court of Appeals, Fourth Circuit, April 9, 1912.)

[195 Fed. Rep. 231.]

Carriers—Injuries to Passengers—Evidence—Admissibility.—Where in an action for injuries to a street car passenger struck by a car while attempting to board another car, the evidence was conflicting on the issue as to whether the latter car stopped at the time and place where the passenger attempted to board it, evidence of the custom of the street railroad company to stop cars at such place to permit passengers to alight from or board cars was relevant to sustain the passenger's contention, though standing alone, it did not prove that the car stopped at the time of the injury.

Carriers—Injuries to Passengers—Contributory Negligence—Last Clear Chance.*—Where a street car passenger negligently placed himself in peril by going on the steps of a car while in motion, and when the gate was closed, it devolved on the street car company under the doctrine of last clear chance, if his dangerous situation was seen, or could by the exercise of reasonable care have been seen, to avoid any injury to him by the use of reasonable care.

Carriers—Injuries to Passengers—Negligence.—Where a person went to the place where street cars were accustomed to stop to take on and discharge passengers, and he undertook to board a car that stopped while passengers were admitted from both sides, and he was injured by the negligently running of another car on him while on the lower step, the company was negligent.

Trial—Issues—Weight of Evidence.—Where the testimony is peculiarly contradictory, the jury must determine the facts.

*For the authorities in this series on the subject of the application of the last clear chance doctrine in actions for injuries to passengers, see last foot-note of *Kruck v. Connecticut Co. (Conn.)*, 41 R. R. R. 462, 64 Am. & Eng. R. Cas., N. S., 462; *Montgomery v. Colorado Springs & I. Ry. Co. (Colo.)*, 40 R. R. R. 697, 63 Am. & Eng. R. Cas., N. S., 697 (where passenger has negligently placed himself in a position of peril); *MacFeat v. Philadelphia, etc., R. Co. (Del.)*, 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56.

For the other authorities in this series on the subject of the last clear chance doctrine, see foot-note of *Louisville & N. R. Co. v. Vanarsdell (Ky.)*, 10 R. R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1, where all those preceding it are collected or referred to; last foot-note of *Underwood v. Old Colony St. Ry. Co. (R. I.)*, 42 R. R.

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In error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Action by Frank Rotolo against the Norfolk & Atlantic Terminal Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This is the third time this case has been before the court here. The first time several points arising upon the pleadings, and in the trial of the cause, were passed upon by this court. See *Norfolk & Atlantic Terminal Company, Plaintiff in Error, v. Rotolo, Defendant in Error*, 179 Fed. 639, 103 C. C. A. 197. Then came the case of *Norfolk & Atlantic Terminal Company, Plaintiff in Error, v. Rotolo, Defendant in Error*, and the decision of the court in that instance is reported in 191 Fed. 4. The following is a succinct statement of the facts:

The plaintiff in error, defendant below, hereinafter called the defendant, is a Virginia corporation, and operates a line of electric street railway in the city of Norfolk, Va., and had a portion of its tracks laid in City Hall avenue and Monticello avenue in said city. Frank Rotolo, the defendant in error, who was the plaintiff below, hereinafter called the plaintiff, is a subject of the king of Italy, and was temporarily residing in Norfolk at the time of the injury, which was the cause of this action. The tracks of the defendant's railway run parallel along Monticello avenue in the city of Norfolk north and south, and at a point about opposite the Monticello Hotel corner, where City Hall avenue intersects with Monticello avenue, and about midway between that corner on the west, and market corner on the east the tracks diverge, the one curving sharply to the right, or southwest, and the other curving sharply to the left, or southeast. The plaintiff, as before stated, was temporarily residing in Norfolk, and was employed as a workman at the Jamestown Expo-

R. 335, 65 Am. & Eng. R. Cas., N. S., 335; last foot-note of *Morton v. Southern Ry. Co. (Va.)*, 41 R. R. R. 758, 64 Am. & Eng. R. Cas., N. S., 758; last foot-note of *Kruck v. Connecticut Co. (Conn.)*, 41 R. R. R. 462, 64 Am. & Eng. R. Cas., N. S., 462; second head-note of *Hammers v. Colorado, etc., R. Co. (La.)*, 41 R. R. R. 414, 64 Am. & Eng. R. Cas., N. S., 414; third foot-note of *Stewart v. Portland Ry. L. & P. Co. (Ore.)*, 40 R. R. R. 794, 63 Am. & Eng. R. Cas., N. S., 794; fourth head-note of *Plinkiewisch v. Portland Ry., etc., Co. (Ore.)*, 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; second head-note of *Nivert v. Wabash R. Co. (Mo.)*, 40 R. R. R. 659, 63 Am. & Eng. R. Cas., N. S., 659; *Stein v. United Railroads (Cal.)*, 40 R. R. R. 419, 63 Am. & Eng. R. Cas., N. S., 419; last paragraph of fourth foot-note of *Acton v. Fargo & Moorhee St. Ry. Co. (N. Dak.)*, 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; last head-note of *Wilson v. Illinois Cent. R. Co. (Iowa)*, 39 R. R. R. 282, 62 Am. & Eng. R. Cas., N. S., 282; last head-note of *Adams v. Arkansas, L. & G. Ry. Co. (La.)*, 39 R. R. R. 254, 62 Am. & Eng. R. Cas., N. S., 254; last foot-note of *United Rys. & Elect. Co. v. Kolken (Md.)*, 39 R. R. R. 52, 62 Am. & Eng. R. Cas., N. S., 2.

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sition. On the 1st day of April, 1907, between 6 and 7 o'clock in the morning, the plaintiff, intending to go to the Exposition grounds, attempted to board one of defendant's cars which had come in from Pine Beach, and was bound south, and was due to turn the curve in the railway, above described, to the southwest, and whilst attempting to board the said car, and when on the steps of the rear platform on the side next to the other track, he was struck by another car either standing on the curve which turned to the southeast, or moving along around said curve toward the north, and so injured that his left leg had to be amputated. Plaintiff brought this action against defendant in the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk, to recover damages for the injury on the ground that it was the result of defendant's negligence, and in the last trial was awarded \$4,000 with interest from November 22, 1911, for which amount judgment was rendered in his favor against defendant. The case is here by writ of error sued out by the defendant.

W. H. I'enable and Eppa Hunton, Jr. (Henry W. Anderson, on the brief), for plaintiff in error.

J. L. Jeffries (Jeffries, Wolcott, Wolcott & Lankford, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). The assignments of error relied on by the plaintiff in error, who will hereafter for convenience be called the defendant, in the case before us now are two in number. The one is based on exception to the admission of testimony, the other on exception to the action of the trial court in submitting to the jury upon all of the testimony the question of the last clear chance.

[1] As to the first proposition, the defendant in error here, who will be referred to as the plaintiff, in the course of the trial, over the objection of the defendant, was permitted by the court to testify that the defendant's cars coming south from Pine Beach were in the habit of stopping at the point where he (the plaintiff) attempted to go aboard at the time of the injury, and that the gates on both sides of the cars when stopped at this point were opened and passengers were permitted to dismount from the cars, and also to go aboard on both sides. Other witnesses for the plaintiff, over the objection of the defendant, made substantially the same statement. The ground of the objection to this testimony, as stated in the bill of exceptions, is as follows:

"* * * For the reason that the testimony was irrelevant and immaterial to the issue in this case, and for the reason that it was improper to prove any custom as evidence that the defendant stopped its car at the point claimed in the declaration,

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and that the gates on both sides of cars were customarily opened by the defendant, and for the reason that the evidence was not limited to a car coming from the car barn without passengers to discharge, but only to receive passengers for the Exposition."

In the argument the counsel insists that this testimony was inadmissible to prove the fact that the car, on the step of which the plaintiff was standing when he was injured, stopped at the point referred to at the particular time in question. We readily concede that standing alone testimony that it was the custom or habit of defendant to stop its cars and discharge and take on passengers at the point where plaintiff attempted to go aboard was insufficient to prove the fact that the car stopped on the occasion of the injury, but plaintiff testified that the car did stop at the point and at the time in question, and that the gates were opened and passengers dismounted and others went aboard. Other witnesses for the plaintiff testified to the same effect. On the other hand, a number of witnesses for the defendant testified that the car did not stop, and thus there was a direct irreconcilable conflict of testimony as to the fact. Under these circumstances, in our opinion, testimony that it was the custom of defendant to stop its cars at this point was not only relevant, but it tended to throw light upon the controverted fact and to sustain plaintiff's contention.

The text-writers and the courts have provided us with much learning and numerous decisions relative to the admissibility, the relevancy and probative value of testimony in regard to habit or custom as showing the doing, or not doing, of a particular thing on a specific occasion. Wigmore, in his treatise on Evidence (vol. 1, § 92), cites the case of *Walker v. Barron*, 6 Minn. 508-512 (Gil. 353), in which it is said:

"Customs may, like other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done, or not done, which act is the subject of contest."

And, also in the case of *State v. Railroad*, 52 N. H. 528, in which it is held:

"It would seem to be axiomatic that a man is likely to do, or not to do, a thing, or do it or not do it in a particular way (according) as he is in the habit of doing it, or not doing it."

The same doctrine is laid down in the case of *Parrott v. Railroad*, 140 N. C. 546, 53 S. E. 432.

In *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, Mr. Justice Day, in delivering the opinion of the court, used this language:

"* * * As we have said, the question concerns the relevancy of proof, and not whether it finally establishes the issue made, one way or the other. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate

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tendency to establish a controverted fact. Relevancy is that 'quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit.' 1 Bouvier, Law Dic. Rawle's Revision, 866."

In *Holmes v. Goldsmith*, 147 U. S. 150, on page 164, 13 Sup. Ct. 288, on page 292 (37 L. Ed. 118), Mr. Justice Shiras, in delivering the opinion of the court, adopts the following from the case of *Stevenson v. Stewart*, 11 Pa. 307:

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."

Our views, as will be seen, are in harmony with the principles annunciated in these cases. But, aside from this, if the testimony objected to was relevant to any material issue in the case, it was not error to admit it. Defendant insisted that the injury was the result of plaintiff's negligence, and one of the negligent acts charged to him was that he had crossed the parallel track and had attempted to board the car whilst it was in motion at a place where there was no stop. We think, under the circumstances, that it was plaintiff's right to introduce testimony to prove that it was the custom or habit of defendant's cars to stop at that point, to open gates to the cars, and there receive and discharge passengers; not that this testimony alone, as before stated, was sufficient to prove the fact that the car stopped on the occasion when plaintiff was injured, but it was relevant, in our opinion, as bearing upon plaintiff's conduct at the time, and in explanation of his presence at the place where he undertook to go aboard. The custom or habit of railway trains or cars to stop at a particular place to receive and discharge passengers is notice to the public to go to that place for the purpose of taking passage on such trains or cars. Our conclusion, therefore, is that there was no error in the admission of the testimony embraced within this exception.

On the remaining question presented for our consideration the counsel for the defendant takes the position that (we quote from the brief):

"The doctrine of the last clear chance has no application in this case, but that it is in the view most favorable to the plaintiff a case of concurrent negligence in which there can be no recovery."

There is nothing in the record to advise us that the jury based the verdict in this case upon the doctrine of the last clear chance, although we think that upon the evidence for the plaintiff, and that of the defendant, this principle might properly have been invoked.

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[2] If the jury found that the plaintiff negligently put himself in peril by going upon the steps of the car whilst it was moving, and when the gate was closed, yet the duty devolved upon the defendant if the plaintiff's situation of peril was seen, or could, by the exercise of reasonable care, have been seen, and the injury could have been avoided by the use of such care on the part of the defendant, then the last clear chance proposition could be applied.

[3] On the other hand, if plaintiff's version was accepted by the jury, and there was testimony to support it, that plaintiff went to the place where the cars of defendant were accustomed to stop and take on and discharge passengers, that the car plaintiff undertook to board did stop, that passengers were admitted from both sides, that plaintiff was on the lower step following others into the car, and in this position the defendant injured him by negligently running another car upon him, as we say, if the jury found from the evidence that such were the facts, then the doctrine of the last clear chance was not involved, but the injury would be accredited directly to the negligence of the defendant when the plaintiff was not in the wrong.

[4] However, as we have stated, the testimony in this case was peculiarly contradictory, and it was the province of the jury to determine what the truth of the transaction was. The counsel voluntarily abandoned an exception which had been taken to the refusal of the court to direct a verdict for the defendant upon all the testimony. This seems to us an admission that there was sufficient evidence to go to the jury to authorize a recovery in favor of the plaintiff in some view of the case.

We think the judgment of the Circuit Court should be affirmed.
Affirmed.

GEIGER v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania, Feb. 5, 1912.)

[83 Atl. Rep. 367.]

Carriers—Trial—Carriage of Passengers—Actions for Injuries—Instructions.—Where the driver of a beer wagon gets into an altercation with the crew of an open street car, and in attempting to get on the car to go to the car barn and make a complaint, as he alleged, which purpose was denied by the company, he was killed by another car colliding with him, it is error to submit to the jury only the question whether deceased was a passenger or intending passenger, giving no instructions as to what was necessary to constitute him such a passenger, and ignoring the question of contributory negligence.

Carriers—Carriage of Passengers—Who Are Passengers.*—In an action against a street railroad company for causing death, where the decedent was killed while forcing his way into the car from the wrong side at an unusual and improper place, he could not be regarded as a passenger, and the mere fact that he had succeeded in getting his feet upon the running board, and even upon the body of the car, was not sufficient to make him one.

Carriers—Carriage of Passengers—Actions for Injuries—Instructions.—In an action for causing death of an alleged passenger, it was error to leave it to the jury to say whether decedent's injury resulted from his being struck by the motorman without giving instructions as to the scope of the motorman's employment.

Appeal from Court of Common Pleas, Allegheny County.

Action by Mary Geiger, as survivor of Adam Geiger, and individually, against the Pittsburgh Railways Company for death of plaintiff's son. From a judgment for plaintiff, defendant appeals. Reversed, with venire facias de novo.

The circumstances of the accident are stated in the opinion of the Supreme Court.

The defendant presented the following points:

"Third. A person attempting to board a car by climbing over the guard rail on the blind side of an open car is not a passenger, and the mere fact that he gets into the body of the car in safety does not make him a passenger." Answer: "Refused."

"Fourth. The deceased, Michael Geiger, in attempting to board an open summer car on the blind side, placed himself in a dangerous position, and was guilty of contributory negligence; therefore, the plaintiff in this case is not entitled to recover." Answer: "This point is affirmed, if you find that this accident

*See extensive note, 42 R. R. R. 353, 65 Am. & Eng. R. Cas., N. S., 353.

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arose from the facts that this point will cover, namely: That this man placed himself in a dangerous position, where he ought not to have placed himself, and where he took the risk; and, if he lost his life there, that then he was guilty of contributory negligence and she could not recover in this case."

The court charged in part as follows: "And if you arrive at the conclusion from the weight of the evidence that this Michael Geiger was a passenger or an intending passenger, and did not go to that front platform for the purpose of renewing this altercation, then there could be a recovery in this case. And then you come to the question of damages."

Verdict and judgment for plaintiff for \$2,898. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

William A. Challener and Clarence Burleigh, for appellant.
Rody P. Marshall and Thos. M. Marshall, for appellee.

POTTER, J. [1] This was an action of trespass brought by Adam Geiger and Mary Geiger, his wife, against the defendant company, to recover damages for the death of their son, Michael Geiger. The latter was the driver of a beer wagon. On the evening of September 6, 1909, he stopped his wagon and two-horse team in front of a saloon on the corner of Twenty-Seventh and Carson streets, Pittsburgh. Geiger went into the saloon, leaving the team standing between the curb and the street railway track. An open summer car came along, and, owing to the narrow space between the track and the curb, was unable to pass. Geiger was called out of the saloon, and, instead of promptly starting his team and clearing the way for the car, he engaged in an altercation with the men in charge of the car. He attempted to board the car, as appellant claims, for the purpose of assaulting the motorman; but counsel for appellee maintain that it was for the purpose of riding to the car barn, in order to make complaint against the motorman and conductor. Geiger was prevented from getting on the car at the side nearest the curb by the motorman of another car which had also been stopped, and he went around in front of the car, falling over the fender as he passed, and tried to board the car from the inner side. He got up on the running board and put one leg over the chain or bar that prevented access to the front platform on that side. The evidence indicates that while in this position he was struck by a car coming from the opposite direction on the other track, and so injured that he died in a short time. It was contended on the part of plaintiff that the motorman either struck or struck at Geiger while he was attempting to get upon the platform.

The trial judge refused binding instructions for the defendant, and submitted the case to the jury, who found a verdict for

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the plaintiff. The defendant has appealed, and in the fourth assignment of error counsel have alleged the inadequacy of the charge, in that the jury were instructed that if they found the decedent was a passenger or an intending passenger, and did not go to the front of the platform for the purpose of renewing the altercation, there could be a recovery in this case. This instruction to the jury gave no intimation whatever as to what was necessary under the circumstances to constitute Geiger an actual or intending passenger. It was also inadequate, in that it ignored the question of contributory negligence, and permitted the jury to infer that the case might turn entirely on the question of whether Geiger was or was not a passenger at that time. This error is repeated and emphasized near the conclusion of the charge, where the court says: "So that, as the court has said to you, the first question for you to determine in this case is whether this Michael Geiger was ever a passenger upon that car or an intending passenger. If he was not, then there can be no recovery in this case."

[2] It is very difficult, under the evidence in this case, to reconcile the verdict of the jury in favor of the plaintiff with any proper understanding by the jury of what was required to constitute a passenger. If Geiger was hurt while forcing his way into the car from the wrong side, and at an unusual and improper place, he should not have been properly regarded as a passenger at the time, and the jury should have been plainly so instructed. If Geiger was attempting to get upon the car by climbing over the guard rail from the wrong side, just before he collided with the other car, the mere fact that he had succeeded in getting his feet upon the running board, or even upon the body of the car, would not be sufficient to constitute him a passenger.

[3] The learned trial judge also left it to the jury to say whether or not Geiger's injury resulted from his being struck by the motorman. It does not appear, however, that the jury was given any instructions as to the scope of the motorman's employment. If his alleged action in striking at Geiger was not within the line of his employment, or if it was in self-defense, in attempting to protect himself from the unprovoked assault of Geiger, the defendant company should not have been held responsible. The circumstances of the accident were most unusual. As disclosed by the evidence, the conduct of Geiger in attempting to mount the car at the time and place and in the manner in which he did was apparently without any valid reason or excuse. The case called for unusually complete and careful directions to the jury in order to insure a just verdict. We feel that the charge did not adequately cover the essential questions involved.

The fourth assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

MARTIN v. OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Plymouth, May 21, 1912.)

[98 N. E. Rep. 579.]

Carriers—Carriage of Passengers—Personal Injuries—Contributory Negligence—Evidence.—In a street car passenger's action for injuries by falling by her dress catching upon the sand-plunger in the vestibule, which projected above the floor, evidence held to sustain a finding that plaintiff was not guilty of contributory negligence.

Carriers—Carriage of Passengers—Personal Injuries—Setting Down Passenger.*—Where a street car passenger in alighting was invited to pass through the vestibule close to electrical apparatus, the motorman was bound to protect her from any danger incident to its presence, by exercising the highest degree of care consistent with the practical performance of his duties.

Carriers—Carriage of Passengers—Personal Injuries—Sufficiency of Evidence.†—In a street car passenger's action for injuries by falling by her dress catching upon the sand-plunger in the vestibule, which projected above the floor, evidence held to sustain a finding of negligence by the motorman in not taking precaution for plaintiff's safety, either by removing the plunger, or guarding it with his foot, or warning her of its presence.

*For the authorities in this series on the subject of the degree of care required of a street railway as a carrier of passengers, see extensive note, 1 R. R. R. 42, 24 Am. & Eng. R. Cas., N. S., 42; third foot-note of *Denver City Tramway Co. v. Hills* (Colo.), 41 R. R. R. 505, 64 Am. & Eng. R. Cas., N. S., 505; first foot-note of *Louisville Ry. Co. v. Wilder* (Ky.), 41 R. R. R. 148, 64 Am. & Eng. R. Cas., N. S., 148.

†For the authorities in this series on the subject of the duty to warn and instruct passengers, see extensive note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217; first foot-note of *Pennsylvania R. Co. v. Stockton* (C. C. A.), 40 R. R. R. 542, 63 Am. & Eng. R. Cas., N. S., 542; *Morris v. Illinois Cent. R. Co.* (La.), 39 R. R. R. 169, 62 Am. & Eng. R. Cas., N. S., 169; *Hanson v. Chicago, etc., R. Co.* (Kan.), 39 R. R. R. 191, 62 Am. & Eng. R. Cas., N. S., 191; last head-note of *Illinois Cent. R. Co. v. Massey* (Miss.), 38 R. R. R. 587, 61 Am. & Eng. R. Cas., N. S., 587; last head-note of *Penny v. Atlantic C. L. R. Co.* (N. Car.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 353.

For the authorities in this series on the subject of negligence in allowing passengers to expose themselves to danger, see *McCumber v. Boston, etc., Ry. Co.* (Mass.), 39 R. R. R. 463, 62 Am. & Eng. R. Cas., N. S., 463; *Olund v. Worcester Consol. St. Ry. Co.* (Mass.), 38 R. R. R. 525, 61 Am. & Eng. R. Cas., N. S., 525; *Penny v. Atlantic C. L. R. Co.* (N. Car.), 38 R. R. R. 535, 61 Am. & Eng. R. Cas., N. S., 535; *Birmingham Ry., etc., Co. v. Seaborn* (Ala.), 38 R. R. R. 4, 61 Am. & Eng. R. Cas., N. S., 4.

Martin v. Old Colony St. Ry. Co

Carriers—Carriage of Passengers—Personal Injuries—Admission of Evidence.‡—In a street car passenger's action for injuries by falling by her dress catching upon the sand-plunger in the vestibule, which projected above the floor, evidence that the motorman pressed the sand-plunger into place immediately after the accident was properly admitted as tending to show that the pin was higher than usual at the time of the accident; the passenger who released plaintiff's dress having testified that she did not pull the pin up.

Exceptions from Superior Court, Plymouth County; Franklin G. Fessenden, Judge.

Action by Moranda R. Martin against the Old Colony Street Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Stebbins, Storer & Burbank, of Boston, for plaintiff.

Asa P. French and *Jas. S. Allen*, both of Boston, for defendant.

DE COURCY, J. As the plaintiff was alighting from the front platform of the defendant's car the bottom of her dress caught upon the sand-plunger in the vestibule and she fell to the pavement. The plunger is a metal pin with a round head; it is inserted vertically in a hole in the floor, within which it may move up and down freely, and is held in position by its own weight. When pushed down by the motorman's foot it presses against a lever upon which it rests, and thereby opens in a valve in the sand box; and when the foot is removed a spring pulls the plunger back into place.

[1] The jury were warranted in finding that there was no negligence in the conduct of the plaintiff contributing to the accident. The conductor had directed the passengers to leave the car by the forward door, and she had walked out upon the platform and reached the first step when her dress caught and she was thrown down. The bottom of her skirt hung two inches from the ground, and the defendant's contention that, as matter of law, she was careless because she failed to hold it up when alighting, is untenable.

[2, 3] And we cannot say that the evidence did not warrant a finding that the accident was due to the defendant's negligence. The jury specially found that the sand-plunger was in improper condition. It is true the evidence on this point was meagre; but it would warrant a finding that the plunger projected farther

‡For the authorities in this series on the subject of the admissibility of evidence of subsequent precautions as tending to show negligence, see foot-note of *Stevens v. Boston Elev. Ry. Co.* (Mass.), 10 R. R. R. 24, 33 Am. & Eng. R. Cas., N. S., 24, where all those preceding it are collected or referred to; last foot-note of *Felske v. Detroit United Ry.* (Mich.), 41 R. R. R. 422, 64 Am. & Eng. R. Cas., N. S., 422.

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above the floor than usual, and it could be inferred that this would not happen unless the pin was bent or worn, or otherwise out of order. The court rightly refused to give the eighth request. The defendant might be found liable for such an accident, even though the mechanism and appliances in the vestibule were in proper condition and adapted to perform the work for which they were installed. In alighting from the car the plaintiff had been invited to pass through the front vestibule and in close proximity to the electrical apparatus, brake gear and other equipment, and the duty devolved upon the defendant's motorman to protect her from any danger incident to their presence by the exercise of the highest degree of care consistent with the practical performance of all his other duties. If it became necessary for her to pass near a sand-plunger which normally projected two inches above the floor and was likely to escape her notice, the jury could find that the motorman in the proper performance of his duty to her should have taken some precaution for her safety, either by temporarily removing the pin, or guarding it with his foot or warning her of its presence.

[4] What has been said disposes of the requests for rulings. The evidence that a different sand appliance was used on some of the defendant's cars is immaterial in view of the jury's answer to the first special question. The testimony that the motorman pressed the sand-plunger down into place immediately after the accident was rightly admitted. The witness added that when she released the plaintiff's dress she did not pull the pin up. This evidence tended to show at least that at the time of the plaintiff's injury the pin was out of place and higher than necessary or usual. *Kingman v. Lynn & Boston R. R.*, 181 Mass. 387, 64 N. E. 79.

Exceptions overruled.

DE CECCO *v.* CONNECTICUT CO.

(Supreme Court of Errors of Connecticut, May 16, 1912.)

[83 Atl. Rep. 215.]

Carriers—Injuries to Passengers—Liability.—Where injuries to a passenger, caused by the breaking of a brake rod, were due to the carrier's failure to properly inspect and maintain the brakes of the car, it was liable for the injuries.

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Action by Rosina De Cecco against the Connecticut Company to recover damages for personal injuries, alleged to have been received by plaintiff, while a passenger on a car of defendant, through its negligence. There was a judgment for plaintiff, rendered on a verdict for her, and defendant appeals. Affirmed.

Joseph F. Berry, of New Haven, for appellant.

Frank P. McEvoy, of Waterbury, for appellee.

PER CURIAM. The immediate cause of the plaintiff's injury was the breaking of a brake rod. It was competent for the jury to find upon the evidence that the defendant had failed in its duty, as a common carrier of passengers, to the plaintiff, as its passenger, in the matter of the inspection and maintenance of the brakes of the car in question, and that the plaintiff's injury was due to such failure.

There is no error.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY
and the United States Fidelity & Guaranty Company,
Plffs. in Err. *v.* L. V. WALLACE.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY
and the United States Fidelity & Guaranty Company,
Plffs. in Err. *v.* J. D. CROW.

(Submitted December 15, 1911. Decided February 19, 1912.)

[32 Sup. Ct. Rep. 205.]

Courts—Concurrent Jurisdiction—Enforcing Cause of Action Arising under Federal Statute.—A state court may enforce the liability connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable by the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), is not traceable to a violation of the statute, redress for which, under § 9 of the original act, can only be had in the Interstate Commerce Commission or in the Federal courts.

Courts—Enforcing Cause of Action Created by Foreign Statute.—The jurisdiction of state courts extends to the hearing and determination of any civil transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought.

Courts—Concurrent Jurisdiction—Enforcing Cause of Action Arising under Federal Statute.—A state court may enforce the liability of an initial carrier of an interstate shipment, arising under the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, by which such carrier is made liable for a loss beyond its own line.

Commerce—Federal Power—Regulating Liability of Connecting Carrier.—The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, of liability to the holder of the bill of lading for a loss anywhere en route, with a right of recovery over against the carrier actually causing the loss, which is made by the act of February 4, 1887, § 20, as amended by the act of June 29, 1906, in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce.

Carriers—Liability for Loss beyond Line.—A carrier voluntarily receiving property for transportation to a point on another line in another state is, under the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, conclusively treated as having made a through contract of carriage, rendering it liable

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for the other carrier's negligent failure to deliver the shipment to the consignee.

Carriers—Presumption—Burden of Proof—Negligence—Excepted Causes.—Proof of delivery of an interstate shipment to the initial carrier, and of failure to deliver the same to the consignee, raises a presumption of negligence, so as to give rise to the liability imposed by the Carmack amendment of June 29, 1906, to the interstate commerce act of February 4, 1887, for loss or damage caused by it or any other carrier in the chain of transportation, and casts upon it the burden of proving that the loss resulted from some cause for which such initial carrier was not responsible in law or by contract.

Two writs of error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review judgments which affirmed judgments of the County Court of Uvalde County, in that state, holding an initial carrier in an interstate shipment liable to the shipper for loss on a connecting line. Affirmed.

See same case below, No. 108, — Tex. Civ. App. —, 117 S. W. 169; No. 109, — Tex. Civ. App. —, 117 S. W. 170.

The facts are stated in the opinion.

Messrs. *Maxwell Evarts* and *James L. Bishop* for plaintiffs in error.

No appearance for defendants in error.

Mr. Justice LAMAR delivered the opinion of the court:

In both these cases the plaintiff in error was held liable as "initial carrier" for failure to deliver mohair shipped from points in Texas to the consignee in Lowell. The company denied liability on the ground that under the contract expressed in the bills of lading, its obligation and liability ceased when it duly and safely delivered the goods to the next carrier. It excepts to various rulings of the trial court by which it was prevented from proving that it had fully complied with its contract; had duly delivered the mohair, at Galveston, to the first connecting carrier, which delivered it, at New York, to the next carrier, which, in turn, delivered it to the Boston & Maine Railroad. Neither the pleadings nor proof showed what this company did with the mohair, nor the cause of its nondelivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification. This contention, however, was found against the carrier, and it was held liable to the plaintiffs. — Tex. Civ. App. —, 117 S. W. 169, 170.

The question as to whether the plaintiff was entitled to recover the value of the goods at Lowell, or, as provided in the bill of

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lading, at the point of shipment, is suggested in one of the briefs. No such issue was made in the lower court, nor is it referred to in any of the many assignments of error involving the construction and constitutionality of the Carmack amendment to the Hepburn bill of 1906, providing that where goods are received for shipment in interstate commerce, the initial carrier shall be liable for damages caused by itself or connecting carriers, and making void any contract of exemption against such liability. 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149.

1. The jurisdiction of the state court was attacked, first, on the ground that § 9 of the original act of 1887 provided that persons damaged by a violation of the statute "might make complaint before the Commission . . . or in any district or circuit court of the United States." 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.

It was contended that *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, ruled that this jurisdiction was exclusive, and from that it was argued that no suit could be maintained in a state court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of §§ 8 and 9 of the act to regulate commerce. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 208, 55 L. ed. 179, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.

Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb v. Connolly*, 111 U. S. 637, 28 L. ed. 546, 4 Sup. Ct. Rep. 544.

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On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of the United States. This presumption would be strengthened as to a statute like this, passed not only for the purpose of giving a right, but of affording a convenient remedy.

2. The question as to the constitutionality of the Carmack amendment though ably and elaborately urged, is out of the case, having been decided adversely to the contention of the plaintiff in *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164, after the present suit was instituted.

The company, however, seeks to distinguish this from that on the ground that in the *Riverside Case* it was admitted that the damage to the freight was caused by the negligence of the connecting carrier. And, as the statute applies to cases where the damage is caused by the initial or connecting carrier, and as the cause of the loss of the goods does not appear here, it is argued that liability is to be governed by the contract, which provides that the initial carrier should not be responsible beyond its own line. Plaintiff in error insists that the Carmack amendment did not make it an insurer. Under the construction given that statute in *Re Released Rates*, 13 Inters. Com. Rep. 550; *Bernard v. Adams Exp. Co.* 205 Mass. 254, 28 L. R. A. (N. S.) 293, 91 N. E. 325, 18 A. & E. Ann. Cas. 351; *Travis v. Wells, F. & Co.* 79 N. J. L. 83, 74 Atl. 444, it claims that the initial carrier is not deprived of its right to contract with the shipper against liability for damages not caused by either carrier's negligence. But the failure to plead and to prove the cause of the non-delivery of the goods at destination precludes any determination of such questions.

Under the Carmack amendment, as already constructed in the *Riverside Mills Case*, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the car-

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- rier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed.

EAGER v. JONESBORO, LAKE CITY & EASTERN EXPRESS CO.

(Supreme Court of Arkansas, Feb. 5, 1912.)

[147 S. W. Rep. 60.]

Game—Preservation—Protection.—It is within the police power of a state, subject to constitutional limitations, to enact general and special laws reasonably necessary to preserve and protect its game and fish, and to regulate the taking thereof.

Commerce—Game Brought from Foreign Territory.—A state has the same power over fish and game brought within its borders as it has over fish and game found and taken there.

Carriers—Interstate Commerce—Lacey Act—Failure to Comply—Seizure and Confiscation—Carrier's Liability.—Lacey Act (Act Cong. May 25, 1900, c. 553, 31 Stat. 188 [U. S. Comp. St. 1901, p. 3182]) § 5, prohibits a person from delivering to any common carrier for transportation, and prohibits any common carrier to transport from one state or territory to another, the bodies or parts of any wild animals or birds that have been killed in violation of the laws of the state or territory where they were killed, but permits the transportation of dead birds or animals killed during the open season when they may be lawfully taken and the export of which is not prohibited by the laws of the state where killed, provided that all packages containing such birds and animals shipped in interstate commerce shall be marked and designated in a specified manner, and shall be so wrapped that the contents may be readily ascertained on inspection of the outside. Held, that shipment of dead game birds from one state to another was not interstate commerce in the full sense, and that where a quantity of wild ducks, though legally taken and shipped from Arkansas to Illinois, were not packed and marked as required by such act, and by reason thereof were taken and confiscated by a game warden in Missouri while waiting further transportation, in a warehouse, the shipper was not entitled to recover their value against the carrier.

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Appeal from Circuit Court. Mississippi County; Frank Smith, Judge.

Action by D. W. Eager against the Jonesboro, Lake City & Eastern Express Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This suit was brought by appellant to recover the value of nine barrels of wild ducks, delivered to it for shipment from Manila, Ark., on November 19, 1909, to Chicago, Ill. Appellee admitted receiving the ducks for shipment, and alleged that they were delivered to it at Manila, Ark., in violation of the laws of the state of Arkansas, Missouri, Illinois, and the United States, and that while said ducks were in the city of St. Louis, en route to Chicago, they were seized by the game warden of the state of Missouri and destroyed; that said ducks were delivered to appellee to Manila, Ark., in violation of the laws of the state of Arkansas and Missouri, and by reason of appellant shipping them into the state of Missouri in violation of the statutes of that state and the statutes of the United States, while they were in the city of St. Louis, in the possession of the Pacific Express Company, the game warden of that state seized and confiscated the shipment. The testimony shows: That the ducks were delivered to the railroad company, packed in sugar and coffee barrels, that holes were cut in the sides and bored in the bottoms of the barrels, and the tops were covered over with tow sacks. That a tag was placed upon the barrel, containing the name of the consignor and consignee and the charges for shipment paid. That they did not become the property of the consignee until delivered. Each barrel contained six dozen ducks, valued at from \$4.50 to \$6 per dozen. That all the ducks were killed in Big Lake, in Hector township, Mississippi county, Ark., and consigned to parties in Chicago, Ill. That they were unloaded at St. Louis in transit into the warehouse of the express company awaiting a train to Chicago. That while in said warehouse the deputy game wardens of the state of Missouri seized the shipment without writ or process of any kind, and that in making the seizure they did so under the laws of the state of Missouri. That the tag taken from the shipment read, "A. Stallwood & Co., Chicago. From J. B. Kilmer, Manila, Arkansas." There was nothing on the face of the tags to indicate who the shippers were, but on the reverse side of the tag was the name of the shipper. The seizures were made without any warrants. They were seized because the game wardens presumed they had been shipped in violation of the game laws of Missouri, and turned over to the different charitable institutions in accordance with such laws.

The plaintiff requested the court to make certain findings of facts and declarations of law, which it refused to do. It then made the following finding of facts and declaration of law:

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“(1) The court finds the facts to be that the wild ducks here sued for were delivered to the defendant as a common carrier, and that they were not delivered at their destination by defendant's connecting carrier, but that the ducks were taken from the possession and custody of defendant's connecting carrier by the game warden of the state of Missouri.

“(2) The court finds that the shipment in question was an interstate shipment, and that the ducks were packed in barrels covered with gunny sacks, and that there were holes in the barrels, but the court finds that the holes in said barrels were not put there in compliance with the provisions of the Lacey Act, and the court further finds that the said barrels containing the wild ducks were not plainly and clearly marked, so that the nature of the contents of said barrels could be readily ascertained on an inspection of the outside of such barrels. The court finds that the entire contents of the barrels could not be known from the holes bored in the barrels, or the covering of the sacks, and that there was nothing about the package to indicate the contents of the barrels except as stated, and that this was not in compliance with the requirements of the Lacey Act.

“Declaration of Law.

“(1) The court therefore declares the law to be that the shipment in question was made in violation of the federal statutes, and, it being an unlawful one, no recovery can be had in this suit because of the failure of the defendant's connecting carrier to deliver the ducks to the consignee.”

Judgment was rendered against appellant, from which he appealed.

J. F. Gautney, of Jonesboro, for appellant.

E. F. Brown, of Jonesboro, for appellee.

KIRBY, J. (after stating the facts as above). The testimony is undisputed that the ducks were killed in certain townships in Mississippi county, Ark., where it was lawful to sell and transport them beyond the limits of the state under the act of June 1, 1909 (Acts 1909, p. 1131); and the court found that they were packed in barrels, and not plainly and clearly marked, so that the contents could be readily ascertained, and not packed and shipped in accordance with the requirements of the Lacey Act; that they were not delivered at their destination by defendant's connecting carrier, because of being taken from its custody and possession and confiscated by the game warden of the state of Missouri, and declared the law to be that the shipment in question was made in violation of the federal statutes, and, being an unlawful one, no recovery could be had in the suit because of the failure of the connecting carrier to deliver the ducks to the consignee.

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The state of Missouri has stringent laws for the protection of its game and fish, and prohibits the sale of any animal, whether taken within or without the state, or lawfully or unlawfully taken, fixing a penalty for the violation thereof. It makes it the duty of the game and fish commissioner to enforce all laws, and to prosecute the violators thereof. He may make complaints and cause proceedings to be commenced for violations of the law without bond for costs, and "said game and fish commissioner shall at any and all times seize any and all birds, animals and fish which have been caught, taken or killed at a time, in a manner or for a purpose, or had in possession, or which had been shipped, contrary to the laws of the state. The unlawful use of any articles contrary to the provisions of the game and fish law shall forfeit the same to the state, and upon their being found by the law under any of the conditions prohibited by this act, shall be destroyed." It makes it the duty of all owners of warehouses, cold storage plants, and common carriers, their agents, servants, and employees, to permit the game and fish commissioner to examine any package in their possession "which the said game and fish commissioner shall suspect or have reason to believe contains fish, birds or game, protected by the laws of the state, and not entitled under such to be transported or had in possession, or when the said game and fish commissioner shall suspect, or have reason to believe, that the said package is falsely labelled. * * * Said game and fish commissioner shall not be liable for damages on account of any search, examination or seizure made in accordance with the provisions of this act."

[1] It is no longer questioned that it is within the police power of the state, subject to constitutional limitations, to enact such general and special laws as may be regarded reasonably necessary for the preservation and protection of its game and fish and to regulate the taking thereof. *Haggerty v. St. Louis Ice Mfg. Co.*, 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; *Organ v. State*, 56 Ark. 267, 19 S. W. 840; *State v. Mallory*, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852; *New York v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75.

[2] It may also be said to be well established that the state has the same power over fish and game brought within its borders as it has over such game and fish found within its limits. *New York v. Hesterberg*, *supra*; *Selkirk v. Stephens*, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759; *In re Deininger* (C. C.) 108 Fed. 623; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; *Merritt v. People*, 169 Ill. 218, 48 N. E. 325; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *People v. O'Neil*, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696; *State v. Shattuck*, 96 Minn. 45, 104 N. W. 719, 6 Ann. Cas. 934; *People v. Martin*,

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123 App. Div. 335, 107 N. Y. Supp. 1076; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566; *State v. Schuman*, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754; *People v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N. S.) 163, 128 Am. St. Rep. 528, 6 Ann. Cas. 353, afterwards affirmed by the Supreme Court of the United States. In addition, such authority is also recognized by the federal statutes, known as the Lacey Act, providing for the regulation of the transportation of game in interstate commerce, as follows: "Sec. 5. That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds, transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation or sale of birds or bird plumage manufactured from the feathers of barnyard fowl." Acts May 25, 1900, c. 553, 31 Stat. 188; 3 Fed. St. Ann. 152 (U. S. Comp. St. 1901, p. 3182).

It is contended by appellant that the game shipped was lawfully killed under laws that permitted it being shipped without the state, and that appellant, having received it for shipment to the point of destination, Chicago, Ill., and failed to deliver it there in accordance with its contract, was bound to him for payment of its value. If the shipment had been of any ordinary personal property, or article of commerce, the contention would unquestionably be correct. The failure to deliver was sufficient evidence of negligence, and, if the carrier was excused from its common-law contract duty by any of the recognized exceptions thereto, the burden devolved upon it to show such fact.

It is contended, further, that the ducks had been lawfully delivered to appellee by appellant for transportation beyond the limits of the state to Chicago, Ill., and that it thereby became an interstate shipment, subject only to the regulations provided by Congress, and that a showing by the appellee that the shipment was taken from its possession under claim of authority by the game warden of the state of Missouri would not excuse its failure to deliver the shipment, nor relieve it of liability for failure to do so. But the court found that it was an interstate shipment, that the ducks were not packed, and the barrels containing them not marked nor attempted to be in compliance with the provisions of the federal statute, regulating such shipments,

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and that, having been so made in violation of such statute, the plaintiff was not entitled to recover because of the failure to deliver it at its destination.

[3] Unquestionably said act makes it unlawful for a person to deliver to any common carrier for transportation and for any common carrier to transport from one state or territory to another state or territory the bodies or parts thereof of any wild animals or birds that have been killed in violation of the laws of the state or territory where they were killed, but permits the transportation of dead birds or animals killed during the open season, when they may be lawfully taken and the export of which is not prohibited by the laws of the state or territory or district where they are killed. But it requires that all packages containing said birds or animals, the ones permitted to be shipped, of course, in interstate commerce, shall be marked and designated in a certain way, that the contents of the packages may be readily ascertained on inspection of the outside, and provides a fine of \$200 for each violation by the shipper and the consignee knowingly receiving such article shipped and the carrier transporting same. It is apparent from this law that the Congress recognized, not only the power of the states to preserve and protect their game and fish, but the extreme difficulty of the successful exercise of such power, and provided, as it could do, reasonable regulations for the shipment of such game as was not unlawfully killed, and was permitted to be exported from the state in which it was captured to another state, and whether this was done with a view to facilitate the shipment of such game, or to assist the different states in the enforcement of their game laws, by requiring such shipments to be so made, labeled, and marked that the nature of the contents thereof may be readily ascertained from a casual inspection of the outside of the package, so that the officer enforcing the local measures will not be troubled to examine such shipments to ascertain if they are but subterfuges to evade the game laws of the locality where discovered, can make no difference. This law is a valid one, and its requirements are plain, and were found to have been violated by the shipper in this instance. It can make no difference to him that the carrier also violated the law in receiving the shipment that was not made in accordance with its requirements, for such does not relieve him. If the shipments had been taken from the custody of the carrier under the forms of law, there is no doubt but that it would have been relieved of liability for failure to deliver same in accordance with the terms of its contract.

In *Baltimore & Ohio R. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579, it is said: "It is not claimed the liability of the defendant was limited by special contract. Its obligation was, therefore, that

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imposed by the rules of the common law, which makes it an insurer of the goods against all losses, except those arising from the act of God, or the public enemies, or from the conduct of the shipper, or the inherent nature of the goods, or, as is held in some cases, from the act or mandate of public authority. With respect to the last exception stated above, the rule seems to be now established that a common carrier is not liable, if the goods be taken from his possession by legal process, against the owner, or if, without his fault, they become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or are intoxicating liquors, intended for use or sale in violation of the laws of the state, which require their seizure and destruction. * * * The principle of the exception, it is said, in *Wells v. Steamship Co.*, supra [4 Cliff. 228, 29 Fed. Cas. No. 17,401], is that the carrier is not obliged to violate the law of the jurisdiction to comply with its contract. In *Atkinson v. Ritchie*, 10 East, 534, it is held that the contract of a common carrier is always subject to the implied condition that he may lawfully comply with its terms; and, if its performance subsequently becomes unlawful, without his fault, he is not required to violate the law of the jurisdiction to complete his undertaking." See, also, 6 Cyc. 462; *Hutchinson on Carriers* (3d Ed.) §§ 324, 325; *Elliott on Railroads*, § 1461; *Railway v. Gans*, 69 Ark. 252, 62 S. W. 738; *Thomas v. Northern Pacific Express Co.*, 73 Minn. 385, 75 N. W. 1120; *Adams v. Scott*, 104 Mass. 164.

It may be that the game warden of Missouri in the seizure and confiscation of this shipment was acting within the power given him by the statutes of that state for the protection of its game and fish, although if he acted beyond his authority, and not in accordance with it, as alleged, he would ordinarily be regarded as but a trespasser, and his actions would not excuse the company from liability to perform its contract. But it is conceded that the shipment was confiscated by the game warden of the state of Missouri under claim of authority for such act from the laws of that state, enacted in the exercise of its police powers to protect and preserve the game of the state, and, if it was rightfully done, it excuses the failure of the performance of the contract of shipment because thereof; but, without regard to whether it was rightfully or wrongfully done, we do not think the appellant can recover in this case. His right to do so is based upon a contract in violation of a plain statute, and, as already stated, the fact that the carrier was equally guilty of a violation of the statute in the making of the contract will not assist him, under the doctrine of the ancient maxim, "*In pari delicto potior est conditio defendentis.*" In *Martin v. Hodge*, 47 Ark. 378, 1 S. W. 694, 58 Am. Rep. 763, the court said:

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"It is a well-settled doctrine that 'every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute.'" In *Lindsey v. Rottaken*, 32 Ark. 619, 631, it is said: "Any act which is forbidden, either by the common or the statutory law, whether it is malum in se, or merely malum prohibitum, indictable or only subject to a penalty or forfeiture, or however otherwise prohibited by a statute or the common law, cannot be the foundation of a valid contract; nor can anything auxiliary to or promotive of such act." See, also, 9 Cyc. 479; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Wood v. Stewart*, 81 Ark. 41, 98 S. W. 711; *Cobb v. Scoggin*, 85 Ark. 106, 107 S. W. 188.

Appellant bases his right to recover upon the claim that the ducks shipped were interstate commerce, and that it was not within the power of the game warden of the state of Missouri to confiscate them, but, as already said, such property is not regarded articles of interstate commerce in the full sense, as other property moving in such commerce, and, in order to have had the protection he claimed himself entitled to in the shipment of this property in such commerce, he should have complied with the plain requirements of the act permitting it. Not having done so, and the property being found by the game warden of said state in a warehouse with other property there stored for delivery within that state and not being marked and designated as required by the said Lacey Act for its shipment in interstate commerce, it was confiscated. Himself having violated the law in the beginning, under which he claims protection, he cannot complain of the negligence or default of the other party to the contract under the circumstances. The parties being in equal wrong, the condition of the defendant is the better, and the judgment is affirmed.

Wood, J., concurs in the judgment.

ROTHCHILD BROS. *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Washington, May 24, 1912.)

[123 Pac. Rep. 1011.]

Carriers—Carriage of Goods—Acts Constituting Delivery.*—

Where a consignee's agent had surrendered the bill of lading for a car load of goods, the car had been spotted on the railroad's delivery tracks for delivery, and the agent had gone to the car, broken the seal, and opened and entered at the time a fire occurred, the goods had been fully delivered to the consignee and were not in possession of the railroad neither as carrier nor warehouseman.

Carriers—Carriage of Goods—Loss—Proximate Cause.†—The negligence of a railroad company in carrying high proof spirits with the barrel in a broken condition was not the proximate cause of a fire destroying the spirits which originated in some way after the consignee had taken possession and when his agents were entering the car to remove the goods.

Carriers—Carriage of Goods—Delivery in Dangerous Condition.—

Where a consignee of high proof spirits was told before taking possession that one of the barrels was broken, the carrier was not liable for a loss by fire originating in some way while the goods were still in the car, but after the consignee had taken possession, since, although it would have been negligence to deliver the spirits in a dangerous or unsafe condition, delivery in good condition was waived by accepting delivery with knowledge of the condition.

Carriers—Carriage of Goods—Liability for Loss.—If a fire destroying a car load of high proof spirits was of spontaneous origin

*For the authorities in this series on the question when does the carrier's liability, as such, terminate after the arrival of freight at its destination, see first foot-note of *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, where all those preceding it are collected; last foot-note of *Johnson & Co. v. Central Vermont Ry. Co.* (Vt.), 42 R. R. R. 628, 65 Am. & Eng. R. Cas., N. S., 628; *Arkadelphia Milling Co. v. Smoker Merchandise Co.* (Ark.), 42 R. R. R. 619, 65 Am. & Eng. R. Cas., N. S., 619; foot-note of *Louisville & N. R. Co. v. Gay* (Ky.), 40 R. R. R. 772, 63 Am. & Eng. R. Cas., N. S., 772; last foot-note of *Podrat v. Narragansett Pier R. Co.* (R. I.), 40 R. R. R. 756, 63 Am. & Eng. R. Cas., N. S., 756.

†For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-note of *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all those preceding it are collected; foot-note of *Crow v. Southern Ry. Co.* (Ga.), 41 R. R. R. 777, 64 Am. & Eng. R. Cas., N. S., 777; third head-note of *Plinkiewisch v. Portland, etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; seventh head-note of *Wells v. Great Northern Ry. Co.* (Ore.), 40 R. R. R. 775, 63 Am. & Eng. R. Cas., N. S., 775; fourth foot-note of *Roberts v. Atlantic C. L. R. Co.* (N. C.), 40 R. R. R. 688, 63 Am. & Eng. R. Cas., N. S., 688.

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caused by contact with the air, the carrier was not liable therefor where, on delivery of the car to the consignee, it notified his agent that one of the barrels containing the spirits was broken.

Principal and Agent—Agency Distinguished from Independent Contract.—Where a consignee of goods employed a transfer company to receive the goods from the carrier, the transfer company was the consignee's agent with reference to receiving the property, although it might be treated as an independent contractor in some circumstances; and hence notice to it of the condition of the goods was notice to the consignee.

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Rothchild Bros. against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

C. H. Winders, of Seattle, for appellant.

Preston & Thorgrimson, of Seattle, for respondent.

FULLERTON, J. The plaintiff, Rothchild Bros., a corporation, brought this action against the defendant, the Northern Pacific Railway Company, to recover the value of a car load of high proof spirits which were shipped by distillers at Peoria, Ill., to the plaintiff at Portland, Or., and destroyed at the last-named place by fire on June 27, 1907. Judgment went for the plaintiff in the court below for the value of the spirits at the rate of \$.50 per proof gallon, being the value to which they were released, as the court found, in the contract of shipment. In its complaint the plaintiff claimed the full market value of the spirits, namely, \$1.28 per proof gallon, plus the cost of transportation from the distillery to the place of delivery. Both parties appeal from the judgment entered; the plaintiff from the refusal of the court to render a judgment in its favor for the full value of the property destroyed, and the defendant from the general judgment holding it liable for the destruction of the property.

The facts material to be considered in determining the controversy are in the main undisputed. The spirits were billed by the distillery company to Portland, Or., and routed over the Chicago, Rock Island & Pacific Railway Company. They were carried by the last-named company to Minneapolis, Minn., in one of its own cars. As the company did not allow its cars to be sent west of Minneapolis, it became necessary to transfer the spirits to another railway whose cars did run west of that point, and the car was turned over to the Minnesota Transfer Company to make the transfer. This company transferred the property to a car of the defendant. While doing so, it discovered that one of the barrels in which the spirits were contained was in bad order; that a stave had broken leaving an opening in the

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barrel out of which something more than one-half of the original contents of the barrel had escaped. The barrel was loaded into the car in its broken conditions, the car delivered to the defendant company and transported by it to its destination at Portland, Or. The car reached Portland some time on the day of June 24, 1907. On that day or the next it was entered and inspected by an agent of the defendant, who discovered, if the company did not then already know, the broken condition of the barrel. After looking over the contents of the car and noting the condition in which the spirits had arrived, he caused the car to be resealed without taking any steps to recover the broken barrel or otherwise make more secure its contents.

The plaintiff had employed the Holman Transfer Company to receive the spirits from the railway company and haul them to its warehouse, and had delivered to the transfer company the bill of lading representing the property. As was his custom, a representative of the transfer company called at the railroad yard on the morning of the 25th of June to ascertain what freight had arrived and was told of the arrival of the car load of spirits, and told further that the car would be spotted on the team or delivery tracks ready for unloading by the next morning. The agent of the transfer company then produced and delivered up the original bill of lading representing the shipment which his company had received from the plaintiff. On the next morning, June 26th, the representative of the transfer company again appeared and was told that the car had been spotted the night before and was ready to be unloaded. He then stated that he would send his teams for the spirits on the next morning. Either on this morning or the day before he was told of the broken condition of the barrel and of the fact that some of its contents had escaped. On the morning of June 27th, the transfer company sent teams in charge of three of its men to receive the contents of the car and haul them to the plaintiff's warehouse; it also informed the man put in charge of the work of the broken condition of the barrel. The men with the teams reached the car at about the hour of 7 o'clock in the morning. The seal on the door was immediately broken, and one of the men entered the car, and another got as far as the door, when the spirits in the broken barrel burst into flame. The flame soon communicated itself to the other barrels, and the entire car load was consumed.

The trial judge among other findings of fact made the following: "That within a proper and reasonable time after the arrival of the car at Portland, Or., the defendant gave notice of its arrival to the transfer company at Portland, which transfer company was employed as an independent contractor by the plaintiff to haul all goods shipped by rail to the plaintiff at Portland, Or., from the railroad tracks to plaintiff's place of

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business in Portland, Or. Thereafter, within a proper and reasonable time, said Portland Transfer Company sent its men and teams to the railroad yards for the purpose of loading onto their wagons and hauling to plaintiff's place of business the contents of said car. Those men entered the car for that purpose, and almost immediately following such entry the contents of the car burst into flames and were entirely destroyed by fire. Such spirits were well known to be and were in fact highly inflammable. The court is unable to determine what was the immediate cause for the spirits breaking into flame. The contents of the car and the inside of the car were in fact then in a highly inflammable condition owing to the broken condition of said barrel of spirits, both from fumes and from spilled contents of the broken barrel. The proximate cause of the happening was the negligence of the defendant in transporting over its line and bringing to Portland the car in its then dangerous condition. The testimony in the case upon the subject of the immediate cause of the fire the court finds is not credible."

A large space in the briefs of counsel has been given up to a discussion of the liability of the defendant for the failure of the Minnesota Transfer Company to recover the broken barrel of spirits prior to sending it forward on the defendant's line; it being conceded that it was an act of negligence to fail to do so. But it has seemed to us that, under the facts shown, this is not a very material question. No harm resulted from the act except perhaps the loss of a small quantity of the spirits from the broken barrel by evaporation while on the way from Minneapolis to Portland for which no claim is made in this proceeding. If it were necessary to recover the barrel of spirits before delivery in order to avoid liability for their destruction by fire, the defendant had that opportunity after the property reached its destination and prior to the time they were so destroyed, and the defendant's liability to the plaintiff must be the same whether it was or was not liable for the negligent act of the Minnesota concern.

[1] Neither have we found it necessary to follow counsel in their discussion as to the nature of the liability of the defendant for the spirits after they reached the Portland yards, that is to say, whether it was liable as a carrier or as warehouseman, as it has seemed to us that this also is an immaterial question. As we view the facts there was an actual delivery of the property to the consignee immediately preceding its destruction, and that the defendant's liability to the appellant at that time was neither that of a carrier nor warehouseman. Not only had the bill of lading been surrendered and the car been spotted on the defendant's delivery tracks for delivery before the fire occurred, but the plaintiff's agents had actually reached the car with teams, had broken the seal of the car, and had opened and entered it

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for the purpose of removing the property. This clearly constitutes a delivery. There was not only a surrender of the right of possession of the property by the defendant, but there was an actual surrender of the property itself by the defendant and an actual taking of the property by the plaintiff. Delivery could have been no more complete had the wagons been actually loaded and started on their way to the plaintiff's warehouse. *Kenny Company v. Atlanta Railroad Co.*, 122 Ga. 365, 50 S. E. 465; *Whitney Co. v. Railroad Co.*, 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767; *Mill Co. v. B., C. R. & N. Ry. Co.*, 102 Iowa, 262, 71 N. W. 255; *Vaughan v. N. Y., N. H. & H. R. Co.*, 27 R. I. 235, 61 Atl. 695.

[2] It follows from the foregoing considerations that the act found by the court to be the proximate cause of the loss of the property was not in fact its proximate cause. Undoubtedly the carriage of the spirits from Minneapolis to its destination at Portland with one of its containers in a broken condition was an event in the sequence of events that led up to the loss of the property, but it was no more the proximate cause of the loss than was the shipment of the original carrier from the place of manufacture to Minneapolis, or perhaps any other act committed in reference to the property prior to its loss.

[3] If any act of the defendant could be said to be the proximate cause of the loss of the property, it was the act of tendering and delivering the property to the plaintiff in an unsafe and dangerous condition. This unquestionably would have been negligence if it had been done without notice to the plaintiff of such condition, and if the fire had occurred for want of care induced by lack of knowledge of its condition. But such was not the case. As we have said, not only was the agent of the plaintiff made aware of the broken condition of the barrel prior to the time the property was tendered for delivery, but the immediate servants of the agent sent to receive the property were also made aware of its condition prior to being so sent. Undoubtedly the plaintiff could without liability on its part have refused to receive the property until the broken barrel was properly repaired or the property otherwise made safe for handling. But, when it consented to receive it after being made aware of its unsafe condition, it waived its right to insist upon a delivery in proper condition and took upon itself the risk of loss of the property arising from the act of removing it in its unsafe condition. Since, therefore, the property was burned while in the possession of the plaintiff through no fault of the defendant other than the fault the plaintiff consented to waive, the loss of the property must be borne by the plaintiff.

[4] It can be gathered from the finding of fact which we have quoted that the trial court thought that the fire causing the loss of the spirits was of spontaneous origin, or originated

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from the sudden bringing of the escaping fumes into contact with the air, but, if this be the meaning of the finding, it has no support in the record. It was shown by the evidence, if indeed the fact be not generally known, that the fumes, or vapors arising from an open barrel of high proof spirits, although kindly inflammable, will not burn unless they are brought into contact with fire in some form; that contact with the air alone tends to dissipate and render them innocuous rather than cause them to burst into flame. Moreover, the plaintiff was warned of the condition of the spirits and was bound to handle them with care in consonance with such condition, and, if it exposed them in such manner as to cause them to burn, the fault is its, not the defendant's. Since we find that there was a delivery of the property prior to its burning, it is not necessary that we inquire into the immediate origin of the fire. But a very satisfactory explanation of its origin is contained in the record showing that it originated from perfectly natural causes.

[5] The court found that the Holman Transfer Company, whom the plaintiff appointed to receive the property, was an independent contractor, and it is argued that, because of this fact, the relation of principal and agent did not obtain between the plaintiff and the transfer company, and hence notice to the transfer company of the broken condition of the barrel was not notice to the plaintiff. But we cannot accept this doctrine. It may be that the transfer company was so far an independent contractor that its acts of negligence resulting injuriously to third persons, even though while in the immediate work of making the transfer of the property, would not give such third persons a right of action against the plaintiff, but as between the plaintiff and the defendant the transfer company was clearly the plaintiff's agent with reference to receiving the property from the defendant, and consequently notice to it was notice to the plaintiff. This view of the questions presented requires a different judgment from that entered in the court below.

The order will be, therefore, that the judgment appealed from be reversed, and the cause remanded to the court below, with instructions to enter a judgment in favor of the defendant to the effect that the plaintiff take nothing by its action.

DUNBAR, C. J., and MOUNT, PARKER, and GOSE, JJ., concur.

UNITED STATES OF AMERICA, Appt. v. TERMINAL RAILROAD
ASSOCIATION OF ST. LOUIS et al.

(Argued October 20 and 23, 1911. Decided April 22, 1912.)

[32 Sup. Ct. Rep. 507.]

Monopolies—Combination of Terminal Systems.—The mere combining of several independent railway terminal systems into one does not necessarily operate as a forbidden restraint, under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), upon the interstate commerce which must use them.

Monopolies—Combination of Terminal Systems—"Combination in Restraint of Trade."—The combination and unification of the terminal facilities of St. Louis under the exclusive ownership and control of less than all the railway companies under compulsion to use them—the inherent conditions being such as to prohibit any other reasonable means of railway access to that city—violates the provisions of the Sherman anti-trust act of July 2, 1890, §§ 1 and 2, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize such commerce which must pass through the gateway at St. Louis.

Monopolies—Combination of Terminal Systems—Extent of Relief.—Adequate relief from a combination of terminal facilities which offends against the provisions of the Sherman anti-trust act of July 2, 1890, §§ 1, 2, because it places such facilities under the exclusive ownership and control of less than all the railroad companies under compulsion, from the peculiar local topographical conditions, to use them, will be afforded by a decree requiring the reorganization of the combination so that it will act as the impartial agent of every railway line which must use the terminal instrumentalities.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri to review a decree dismissing a bill to enforce the provisions of the Sherman anti-trust act against a combination of the railway terminal facilities at St. Louis. Reversed and remanded for the entry of a decree under which the combination shall be reorganized so as to act as the impartial agent of every railroad line which uses its facilities.

The facts are stated in the opinion.

Mr. *Edward C. Crow*, Special Assistant to the Attorney General, Mr. *Charles A. Houts*, United States Attorney, and Attorney General *Wickersham*, for appellant.

Messrs. *H. S. Priest* and *T. M. Pierce* for appellees.

Mr. *John C. Hidgon* as amicus curiæ.

United States of America *v.* Terminal Railroad Association

Mr. Justice LURTON delivered the opinion of the court:

The United States filed this bill to enforce the provisions of the Sherman act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, against thirty-eight corporate and individual defendants named in the margin,[†] as a combination in restraint of interstate commerce and as a monopoly forbidden by that law. The cause was heard by the four circuit judges, who, being equally divided in judgment, dismissed the bill, without filing an opinion. From this decree the United States has appealed.

The principal defendant is the Terminal Railroad Association of St. Louis, hereinafter designated as the terminal company. It is a corporation of the state of Missouri, and was organized under an agreement made in 1889 between Mr. Jay Gould and a number of the defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies at St. Louis, with a view to combining and operating them as a unitary system.

The terminal properties first acquired and combined into one system by the terminal company comprised the following: The Union Railway & Transit Company of St. Louis and East St. Louis; the Terminal Railroad of St. Louis and East St. Louis; the Union Depot Company of St. Louis; the St. Louis Bridge Company; and the Tunnel Railroad of St. Louis. These properties included the great union station, the only existing railroad bridge,—the Eads or St. Louis bridge,—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river. For a time this combination was operated in competition with the terminal system of the Wiggins Ferry Company, and upon the completion of the Merchants' bridge, in competition with it, and a system of terminals which were organized in connection with it. The Wig-

[†]The Terminal Railroad Association of St. Louis; the St. Louis Merchants' Bridge Terminal Railway Company; the Wiggins Ferry Company; the St. Louis Bridge Company; the St. Louis Merchants' Bridge Company; the Missouri, Kansas, & Texas Railway Company; the St. Louis & San Francisco Railway Company; the Chicago & Alton Railway Company; the Baltimore & Ohio Southwestern Railroad Company; the Illinois Central Railroad Company; the St. Louis, Iron Mountain, & Southern Railway Company; the Chicago, Burlington, & Quincy Railway Company; the St. Louis, Vandalia, & Terre Haute Railroad Company; the Wabash Railroad Company; the Cleveland Cincinnati, Chicago, & St. Louis Railway Company; the Louisville & Nashville Railroad Company; the Southern Railway Company; the Chicago, Rock Island, & Pacific Railway Company; the Missouri Pacific Railway Company; the Central Trust Company of New York; A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. E. Schaff, T. C. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher and S. D. Webster.

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gins Ferry Company had for many years operated car transfer boats by means of which cars were transferred between St. Louis and East St. Louis.

Upon each side of the river it owned extensive railway terminal facilities, with which connection was maintained with the many railroads terminating on the west and east sides of the rivers, which gave such roads connection with each other, as well as access to many of the industrial and business districts on each side. In 1890 a third terminal system was opened up by the completion of a second railroad bridge over the Mississippi river at St. Louis, known as the Merchants' bridge. This was a railroad toll bridge, open to every railroad upon equal terms. That it might forever maintain the potentiality of competition as a railroad bridge, the act of Congress authorizing its construction provided that no stockholders in any other railway bridge company should become a stockholder therein. But as this was a mere bridge company, it was essential that railroad companies desiring to use it should have railway connections with it on each side of the river. For this purpose two or more railway companies were organized and lines of railway were constructed connecting each end of the Merchants' bridge with various railroad systems terminating on either side of the river. The Merchants' bridge and its allied terminals were thereby able to afford many, if not all, or the railroads coming into St. Louis, access to the business districts on both sides of the river, and connection with each other.

Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis: First, the original Wiggins Ferry Company, and its railway terminal connections; second, the Eads Railroad bridge and the several terminal companies by means of which railroads terminating at St. Louis were able to use that bridge and connect with one another, constituting the system controlled by the terminal company; and, third, the Merchants' bridge and terminal facilities owned and operated by companies in connection therewith.

This resulted in some cases in an unnecessary duplication of facilities, but it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service. Important as were the considerations mentioned, their independence of one another served to keep open the means for the entrance of new lines to the city, and was an obstacle to united opposition from existing lines. The importance of this will be more clearly seen when we come to consider the topographical conditions of the situation.

That the promoters of the terminal company designed to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, is manifested by the declarations of

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the original agreement, as well as by the successive steps which followed. Thus, the proviso in the act of Congress authorizing the construction of the Merchants' bridge, which forbade the ownership of its stock by any other bridge company or stockholder in any such company, was eliminated by an act of Congress, and shortly thereafter the terminal company obtained stock control of the Merchants' Bridge Company, and of its related terminal companies, and likewise a lease.

The Wiggins Ferry Company owned the river front on the Illinois shore opposite St. Louis for a distance of several miles. It had on that side and on its own property, switching yards and other terminal facilities. From these yards extended lines of rails which connected with its car transfer boats and with the termini of railroads on the Illinois side. On the St. Louis side of the river it had like facilities by which it was in connection with railway lines terminating on that side. That company was consequently able to interchange traffic between the systems on opposite sides of the river, and to serve many industries. In 1892 the Rock Island Railroad Company endeavored to obtain an independent entrance to the city. For this purpose it sought to acquire the facilities owned by the Wiggins Ferry Company by securing a control of its capital stock. This was not deemed desirable by the railroad companies which jointly owned the terminal company's facilities, and to prevent this acquisition effort was made to secure control of the stock. The competition was fierce and the market price of the shares pushed to an abnormal price. The final result being in doubt, an agreement was reached by which the Rock Island Company was admitted to joint ownership with the other proprietary companies in all of the terminal properties which were operated by the terminal company, or which should be acquired by it. The shares in the ferry company bought by the Rock Island were transferred to the terminal company at cost, and were paid for by that company. These shares, united with those which had been acquired by the terminal company, enabled the latter to absorb the properties of the ferry company, and thus the three independent terminal systems were combined into a single system.

We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the anti-trust act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint, forbidden by the act of Congress, as construed and applied by this court in the

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cases of *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.), 834, 31 Sup. Ct. Rep. 502, and *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted.

The consequences to interstate commerce of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. Though twenty-four lines of railway converge at St. Louis, not one of them passes through. About one half of these lines have their termini on the Illinois side of the river. The others, coming from the west and north, have their termini either in the city or on its northern edge. To the river the city owes its origin, and for a century and more its river commerce was predominant. It is now the great obstacle to connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines, upon identical terms. And so the commercial interests of St. Louis sought to solve the question, the system of car ferry transfer being inadequate to the growing demands of an ever-increasing population. The first bridge, called the Eads bridge, was, and is, a toll bridge. Any carrier may use it on equal terms. But to use it there must be access over rails connecting the bridge and the railway. On the St. Louis side the bridge terminates at the foot of the great hills upon which the city is built; on the Illinois side it ends in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side it was necessary to tunnel the hills, that the valley of Mill creek might be reached, where the roads from the west had their termini. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge, the Merchants' bridge. This, too, was, and is, a toll bridge, and may be used by all upon equal terms. To prevent its control by the Eads Bridge Company, it was carefully provided that no stockholder in any other bridge company should own its shares. But this Merchants' bridge, like the Eads bridge, had no rail connections with any of the existing railroad

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systems, and these facilities, as in the case of the Eads bridge, were supplied by a number of independent railway companies who undertook to fill in the gaps between the bridge ends and the termini of railroads on both sides of the river. It must be also observed that these terminal companies were in many instances so supplied with switch connections as not only to connect with the bridge, but also served to connect such roads with each other and with the industries along their lines. Now, it is evident that these lines connecting railroad termini with the railroad bridges dominated the situation. They stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not comply with their terms. The topographical situation making access to the city difficult does not end with the river. The city lies upon a group of great hills which hug the river closely and rapidly recede to the west. These hills are penetrated on the west by the narrow valley of Mill creek, which crosses the city about its center. Railways coming from the west use this valley, but its facilities are very restricted and now quite occupied. North of the city the hills drop back from the river gradually, and there exists a valley formed by the Mississippi and Missouri rivers. Railroads coming from the north on the west side of the river come by this valley. As we have stated before, the valley of the Mississippi at St. Louis is on the Illinois side of the river. Railroads coming from the east, northeast, and southeast have their termini in that valley. As a consequence, there have grown up numerous cities and towns of some consequence as manufacturing places, the chief of which is East St. Louis.

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company. The averment of the bill that the railroad companies, here defendants, being the sole stockholders of the terminal company, as we shall later see, compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the terminal company, is therefore borne out by the facts of the situation. Nor is this effect denied; for the learned counsel representing the proprietary companies, as well as the terminal company, say in their filed brief: "There indeed is compulsion, but it is inherent in the situation. The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." Obviously, this was not true before the consolidation of the systems of the Wiggins Ferry Company and the Merchants' Bridge Company with the system theretofore controlled by the terminal company. That the nonproprietary companies might have been compelled to use

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the instrumentalities of one or the other of the three systems then available, and that the advantages secured might not have been so great as those offered by the unified system now operated by the terminal company, must be admitted. But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was therefore a menace to complete domination, as keeping open the way for greater competition. Only by their absorption or some equivalent arrangement was it possible to exclude from independent entrance the Rock Island Company, or any other company which might desire its own terminals. To close the door to competition, large sums were expended to acquire stock control. For this purpose the obligations of the absorbed companies were assumed and new funds obtained by mortgages upon the unified system.

The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated. If the terminal company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between the East and West must depend. The fact that the terminal company is not an independent corporation at all is of the utmost significance. There are twenty-four railroads converging at St. Louis. The relation of the terminal company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants. In the contract of 1889, above referred to, the purpose of acquiring the first terminals combined is declared to be, "that said properties may be held in perpetuity as a unit, and developed and improved in the interest of the proprietary companies, for the purpose of

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furnishing adequate terminal facilities in St. Louis and East St. Louis." This purpose was carried out by the conveyance to "each of the proprietary companies . . . forever, a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties . . . now held or that may be hereafter acquired in St. Louis and East St. Louis, . . . it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company."

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to, which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the terminal company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any nonproprietary company.

By that and the supplemental agreement of December, 1902, the ferry company and the Merchants' Bridge Company having then been absorbed, the proprietary companies prescribe that the charges of the company shall be so adjusted as to produce no more revenue than shall equal the fixed charges, operating and maintenance expenses. Deficiencies for those purposes the proprietary companies guarantee to make good, though such payments are to be reimbursed by an increase in charges, if necessary.

We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the terminal company, though counsel say that no such company will now find itself excluded from joint use or ownership upon application. That other companies are permitted to use the facilities of the terminal company upon paying the same charges paid by the proprietary companies seems to be conceded. But there is no provision by which any such privilege is accorded.

By still another clause in the agreement the proprietary companies obligate themselves to forever use the facilities of the terminal company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one third of the railroad mileage of the United States.

In acquiring these properties the terminal company has assumed mortgage and stock dividend obligations of the constitu-

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ent companies aggregating about twenty-five million dollars. It has executed its own mortgage upon all of its property to secure an issue of fifty million dollars of bonds, of which twenty million dollars worth have been sold, and the proceeds used in construction or in paying for the properties acquired. It has thus about forty-five million dollars of mortgage or fixed charges or liabilities. The company has an authorized capital stock of fifty million dollars. Of this about twenty-eight million dollars have been issued in equal proportions to the several owning railroad companies. No dividends have ever been paid, and the company disclaims any purpose to pay dividends. We fail to find any obligation by which they may be prevented from paying dividends upon the stock held by the proprietary companies, or that in its treasury, if ever issued. Undoubtedly, the major part of this revenue arises from the business done by the proprietary companies through the terminal company, but that coming from other companies is, however, a large contribution. That no direct profit is derived by the owning companies from the operation of the terminals may be true. But it is not clear that the proprietary companies do not make an indirect profit through ownership of obligations of the absorbed companies.

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable. That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies may be true. Aside from their power under all of the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition. To these acts we shall refer later.

We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote commerce.

The argument that the combination of the instrumentalities operated by the terminal company with those of the Merchants' Bridge Company was a combination of two competing lines of railroad, such as was condemned in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, is not well founded. This combination, if properly regarded as of parallel and competing lines, would have been obnoxious to the 17th section of the Constitution of Missouri. For the purpose of enforcing this Missouri prohibition, the state insti-

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tuted a proceeding to dissolve the combination of the properties of the Merchants' Bridge Terminal Railroad Company with the Terminal Railroad Association of St. Louis, upon the ground that the railroads operated by those companies were parallel and competing lines of railroad. Relief was denied. The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies, the Missouri court said:

"A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff.

"St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk-line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to the city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast area, and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all in-coming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden." 182 Mo. 284, 299, 81 S. W. 395.

Among the cases in which the public utility of such companies has been recognized are: *Birdwell v. Gate City Terminal Co.* 127 Ga. 520, 10 L. R. A. (N. S.) 909, 56 S. E. 624; *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *State ex rel. Little v. Martin*, 51 Kan. 462, 33 Pac. 9; *Worcester v. Norwich & W. R. Co.* 109 Mass. 103; *Fort-street Union Depot Co. v. Morton*, 83 Mich. 265, 47 N. W. 228; *State v. St. Paul*

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Union Depot Co. 42 Minn. 142, 6 L. R. A. 234, 43 N. W. 840; Ryan *v.* Louisville & N. Terminal Co. 102 Tenn. 124, 45 L. R. A. 303, 50 S. W. 744.

While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman act. The one in question, counsel say, is not antagonistic to, but in harmony with, the anti-trust act, "because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service." It is justified, they argue, by: "(1) The physical or topographical conditions peculiar to the locality; by (2) its commercial, industrial, and railroad development and history; by (3) public opinion expressed legislatively and judicially; and (4) by the judgment of experienced railroad engineers and managers." From which consideration the same counsel say that the issue presented by this record is, "whether the common control or ownership of all the terminal facilities (mechanical devices for the exchange, receipt, and distribution of traffic) of a large commercial and manufacturing center by all of the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman act."

Let us analyze the proposition included in the issue, as stated by counsel, quoted above: Counsel assume that the combined terminals have come under a "common control or ownership." But this is not the case. That the instrumentalities so combined are not jointly owned or managed by all of the companies compelled to use them is a significant fact which must be taken into account for the purpose of determining whether there has been a violation of the anti-trust act. The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies, are under compulsion to use the terminal system, and yet have no voice in its control.

It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The "physical or topographical condition peculiar to the locality," which is advanced as a prime

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justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities. The witness upon whom the defendants chiefly rely to uphold the advantages of the unified system which has been constructed, Mr. Albert L. Perkins, gives this as his unqualified judgment. He was and is an experienced railroad engineer and manager and is the railway expert of the municipal bridge and terminal board, a commission appointed under a city ordinance, headed by the mayor, to study and report legislation needed to relieve the terminal conditions of St. Louis. From his study of the local situation he expresses the opinion that the terminals of railway lines in any large city should be unified as far as possible, and that such unification may be of the greatest public utility and of immeasurable advantage to commerce, state and interstate. Neither does he find in the conditions at St. Louis any insurmountable objection to such unification. The witness, however, points out that such a terminal company should be the agent of every company, and, furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management. This, he thinks, will serve the greatest possible economy, and will give the most efficient service without discrimination. When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the terminal company is, or by other means, the facilities would belong to each relatively to its own business, and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper.

The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

There are certain practices of this terminal company which operate to the disadvantage of the commerce which must cross the river at St. Louis, and of non-proprietary railroad lines compelled to use its facilities. One of them grows out of the fact that the terminal company is a terminal company and something

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more. It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads, and to assistance in the collecting and distributing of traffic for the carrier companies. It, as well as several of the absorbed terminal companies, was organized under ordinary railroad charters. If the combination which has occurred is to escape condemnation as a combination of parallel and competing railroad companies, it is because of the essential difference between railroad and terminal companies proper—differences pointed out by the Missouri supreme court in the case heretofore referred to. Indeed, the defense to this proceeding is based upon the insistence that the terminal company is solely engaged in operating terminal facilities, defined in the briefs “as mechanical devices for the exchange, receipt, and distribution of traffic.” This terminal company, in addition to its schedule for terminal charges proper, such as switching, warehousing, etc., files its rate-sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river, over its lines. These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within an irregular area of which St. Louis is the center, and having a diameter of from 1 to 200 miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate. An exception is made as to traffic originating within so much of this area as constitutes what is called “Green Line territory,” or which is destined to points within “Green Line territory.” This seems to be based upon competitive conditions caused by the great toll railway bridge at Memphis, Tennessee, the bridge toll being treated by lines using the bridges as a part of the through rate.

Another exception to the rule imposing this arbitrary is that it does not apply to traffic which originates in East St. Louis, whether it is destined to cross the river or not. The reason for this exemption, where such traffic does cross the river, is not apparent. Possibly, it may be said that it is because the traffic of St. Louis and East St. Louis should be treated as arising in the same commercial area. But this reason does not seem to apply to the traffic originating in St. Louis, which is bound east, though that of East St. Louis is altogether free from this arbitrary charge. The effect of this arbitrary discrimination is obviously injurious to the commerce and manufacturers of St. Louis, and is among the chief causes of complaint against the terminal company. Mr. Perkins, to whom we have before referred as a capable and impartial expert, says of the consequence of this curious exception out of the 100-mile area rule, that “the effect of these charges was, of course, to put the man doing business in St. Louis at a disadvantage to that extent with the man doing business at East St. Louis on his eastern business.”

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Again he says, that the practical operation was to give East St. Louis a distinct advantage in the manufacturing lines. Another practice which marks this terminal company as a transportation company which interposed itself between railroads having their termini on opposite sides of the river, and between the city itself and the roads terminating on the east side of the river, is that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, is billed only to East St. Louis, and there rebilled to destination.

The practice of rebilling and of making a distinct hauling charge is an evident survival of the methods which existed when the eastern lines had no termini in St. Louis. They then billed to East St. Louis, and there turned the traffic over to one of the existing terminal companies, who made their own specific charges for the haul to places of delivery within the city. The practice has been continued after the reason for it has disappeared. The effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within 100 miles of the city, destined to cross the river, seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.

We come now to the remedy. In determining what this should be, we, as said by this court in *Standard Oil Co. v. United States*, 221 U. S. 1, 78, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. Rep. 502, must not overlook the fact that in applying a remedy "injury to the public by the prevention of an undue restraint on or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest: and, moreover, that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis.

The government has urged a dissolution of the combination between the terminal company, the Merchants' Bridge Terminal Company, and the Wiggins Ferry Company. That remedy may be necessary unless one equally adequate can be applied.

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But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies through the means and with the object we have stated, of dominating commerce among the states, carried on by other railroads entering or seeking to enter the city of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce, or to do so upon the terms imposed by the proprietary companies. This control and possession constitute such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize.

The power resulting from the combination, even before completed by the acquisition of the Wiggins Ferry Company and its related terminals, was exhibited when the Rock Island sought an independent entrance.

Some of its abuses are shown by the imposition of the arbitrary hauling charge imposed upon the artificially limited trade districts described. It is shown also by the maintenance of the system of billing traffic destined to cross the river at St. Louis, either east or west, or to St. Louis, if from points on the east side of the river,—a practice so galling and universal as to practically “eliminate St. Louis from the railroad map,” to quote the graphic, if extravagant, language of counsel for the United States, as respects the great traffic subject to the regulation.

Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged, and the case is remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the terminal company, which we have pointed out as bringing the combination within the inhibition of the statute.

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First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user, as herein provided for, and the terminal or proprietary companies, which shall arise after a final decree in this cause, may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the terminal company, the Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete

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disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase, or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future combination of the said system, in evasion of such decree or any part thereof.

Mr. Justice Holmes took no part in the hearing or determination of this case.

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err. *v.* OZRO CASTLE.

(Submitted April 22, 1912. Decided May 13, 1912.)

[32 Sup. Ct. Rep. 606.]

Courts—Supreme Court—Appeal—Affirmance on Motion.—A judgment of a Federal circuit court will be affirmed on motion, under Supreme Court rule 6, subd. 5, where the questions urged as a basis for reversal have been so plainly foreclosed by the decisions of the Supreme Court as to make further argument unnecessary.

Master and Servant—Modifying Doctrine of Contributory Negligence—Police Power.—The police power of the state justifies a statutory modification of the doctrine of contributory negligence by providing that such negligence on the part of an injured employee shall not be a bar to a recovery against the employer, where the employee's negligence was slight, and that of the employer gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee.

Constitutional Law—Equal Protection of the Laws—Privileges and Immunities—Injuries to Railway Employees—Comparative Negligence.—Railway companies are not denied the equal protection of the laws, nor are their privileges and immunities as citizens of the United States abridged, by Neb. Comp. Stat. chap. 21, § 4, under which the contributory negligence of a railway employee injured while engaged in train service will not bar a recovery from the company, where his negligence was slight, and that of the company gross in comparison, the damages being diminished in proportion to the amount of negligence attributable to the injured employee.

Commerce—State Regulation—Congressional Inaction—Comparative Negligence.—Until Congress acted in the matter, there was no repugnancy to the commerce clause of the Federal Constitution in the provisions of Neb. Comp. Stat. chap. 21, § 4, under which the contributory negligence of a railway employee injured while engaged

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in interstate commerce did not bar a recovery from the company, where his negligence was slight and that of the company was gross in comparison, the damages being diminished in proportion to the amount of negligence attributable to the injured employee.

Statutes—Invalid in Part.—The validity of Neb. Comp. Stat. chap. 21, §§ 3, 4, in so far as they impose liability upon a railway company for an injury to an employee engaged in interstate commerce, arising from the negligence of a coemployee, and modify the rule of contributory negligence, is not affected because such statute also covers subjects dealt with by the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), such as acts of negligence of railway companies in respect of their cars, road-bed, machinery, etc.

Courts—Federal Courts—Diverse Citizenship—Foreign Corporations.—A corporation originally incorporated under the laws of the state of Missouri, which admits in its answer the existence of the diverse citizenship relied upon to support the jurisdiction of the Federal circuit court for the district of Nebraska over a suit against it, cannot successfully urge, to defeat such jurisdiction, that it had become a Nebraska corporation under the Constitution and laws of that state, as construed by its courts.

In Error to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of plaintiff in an action by a railway employee to recover damages from the railway company for personal injuries. Affirmed.

The facts are stated in the opinion.

Mr. Balie P. Waggener for plaintiff in error.

Messrs. T. J. Mahoney and J. A. C. Kennedy for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court:

Alleging himself to be a citizen of Nebraska, and averring that the railway company was a citizen of Missouri, Castle sued the railway company to recover for injuries received by him while in the service of the railway company as a brakeman upon a freight train operating in the state of Nebraska, the injury having been occasioned through the negligence of a coemployee. The right to recover under such circumstances was based upon a Nebraska statute adopted in 1907, consisting of two sections which are now §§ 3 and 4 of chapter 21 of the Compiled Statutes of Nebraska. The 1st section made every railway company liable to its employees who, at the time of the injury, were engaged in construction or repair works, or in the use and operation of any engine, car, or train for said company, for all damages which may result from the negligence of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track,

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roadbed, ways, or work. The 2d section provided that contributory negligence shall not be a bar to recovery where the negligence of the injured employees was slight and that of the employer was gross in comparison, but that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee. In its answer the railway company admitted that it was then, and was at all of the times mentioned in the petition, "a railroad corporation organized and existing under and by virtue of the laws of the state of Missouri," and set up that the injury to the plaintiff was caused by the negligence of a fellow servant or coemployee, and was also the result of the contributory negligence of the plaintiff. The validity of the 2d section of the statute was challenged because it deprived "of the defense of contributory negligence accorded to all other litigants, persons or corporations, within the state of Nebraska," and because the statute established and enforced against railroads a rule of damages not applicable to any other litigant in similar cases, whereby the privileges and immunities of the company as a citizen of the United States within the jurisdiction of the state of Nebraska were abridged, and it was denied the equal protection of the laws, in violation of the 14th Amendment. The repugnancy of the statute to the commerce clause of the Constitution was also averred, on the ground that "the plaintiff, at the time he received the injuries complained of, and engaged as an employee of an interstate railroad engaged in commerce between the states of Missouri, Kansas, Nebraska," and the statute of Nebraska "attempts to regulate and control as well as create a cause of action and remedy, imposing upon the defendant company a liability inconsistent with and repugnant to the action of the Congress of the United States on said subject."

At the trial the company excepted to the refusal of the court to give instructions embodying its contentions respecting the invalidity of the statute, and also excepted to the giving of certain instructions which were antagonistic to those contentions. From a judgment entered upon a verdict of a jury in favor of the plaintiff, this direct writ of error was sued out.

Defendant in error moves to affirm the judgment under subdivision 5 of rule 6. The motion, we think, should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.

This court has repeatedly upheld the power of the state to impose upon a railway company liability to an employee engaged in train service for an injury inflicted through the negligence of another employee in the same service. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Tullis v. Lake Erie & W. R. Co.*

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175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; and *Mondou v. New York, N. H. & H. R. Co.* 223 U. S. 1, ante, 169, 32 Sup. Ct. Rep. 169.

Obviously, the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow servant also justify a similar departure in regard to the effect of contributory negligence, and the cases above cited in principle are therefore authoritative as to the lawfulness of the modification made by the 2d section of the statute under consideration of the rule of contributory negligence as applied to railway employees. The decision in the *Mondou Case*, sustaining the validity of the Federal employees' liability act, practically forecloses all question as to the authority possessed by the state of Nebraska by virtue of its police power to enact the statute in question, and to confine the benefits of such legislation to the employees of railroad companies; and as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employees, under the conditions shown in this case, the state was not debarred from thus legislating for the protection of railway employees engaged in interstate commerce. See the *Mondou Case*, *supra*, and *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

The circumstance that the Nebraska statute covers acts of negligence of railroad companies in respect to their cars, road-bed, machinery, etc.,—subjects dealt with by the safety-appliance act of March 2, 1893 [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174],—does not afford any substantial ground for the contention that the statute is invalid, in so far as it imposed liability for an injury to an employee arising from the negligence of a coemployee.

In the argument at bar, a contention is made which was seemingly not presented in the court below nor alluded to in the assignments of error; viz., that although originally incorporated under the laws of the state of Missouri, the railway company had, in law and in fact, become a domestic corporation in Nebraska under the Constitution and laws of that state, and was such domestic corporation when this suit was instituted; and in consequence the diversity of citizenship essential to the jurisdiction if the circuit court was wanting. In support of the contention, an allegation of the petition is quoted to the effect that the railway company owned and operated its road as well in the state of Nebraska as in the other states; and reference is made to a provision of the Constitution of Nebraska—§ 8, art. 1, Comp. Stat. (Neb.), 1905, pp. 74, 75—denying to a railroad corporation organized under the laws of any other state or of the United States, and doing business in Nebraska, the power

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to exercise the right of eminent domain, or to acquire the right of way or real estate for depot or other uses until it shall have become a body corporate, pursuant to and in accordance with the law of the state. Two decisions of the supreme court of Nebraska are cited, in one of which (*State ex rel. Leese v. Missouri P. R. Co.* 25 Neb. 164, 165, 41 N. W. 127), it is said it was decided that because of consolidations with domestic companies, the Missouri Pacific Company had become a domestic corporation in the state of Nebraska, and could therefore "acquire a right of way," etc. As to the other (*Trester v. Missouri P. R. Co.* 23 Neb. 243-249, 36 U. W. 502), the contention appears to be that the railway company was held to be a domestic corporation by force of the constitutional provision heretofore referred to. In the face, however, of the clear admission made in the answer of the railway company as to the existence of diverse citizenship, we cannot assent to the soundness of the claim now made, based on the contentions referred to. Certainly, in the absence of any issue on the subject, weight cannot be attached to the decision in 25 Neb.; and it is consistent with the constitutional provisions to infer that the railway company, if it became a domestic corporation of Nebraska, did so by compulsion of the Nebraska statutes on the subject. Indeed, the contention is adversely disposed of by *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713, cited in *Patch v. Wabash R. Co.* 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 80, 12 Ann. Cas. 518. In the Allison Case, the court, among other cases, referred approvingly to *Walters v. Chicago, B. & Q. R. Co.* 104 Fed. 377, where it was held that a corporation originally created by the state of Illinois, although made by the law of Nebraska a domestic corporation of that state, was nevertheless a citizen of Illinois. Judgment affirmed.

FLAHERTY v. NEW YORK CENTRAL & H. R. R. Co.

(Supreme Judicial Court of Massachusetts. Suffolk. May 23, 1912.)

[98 N. E. Rep. 606.]

Master and Servant—Injury to Employee—Contributory Negligence.*—A railroad employee, who is struck by a train while walking in a path alongside a railroad track, is not negligent as a matter of law merely because the path is dangerous.

Master and Servant—Injury to Person Walking Near Track—Evidence.—In an action for injuries to a railroad employee from being struck by a backing train while walking alongside a railroad track, evidence held sufficient to take to the jury the question of plaintiff's due care.

Master and Servant—Injury to Employee—Liability of Masters.—Under Rev. Laws, c. 106, § 71, providing that an employer is liable for injury to an employee from the negligence of a person in charge of a railroad train, a railroad company is liable for injuries to an employee walking near the track, from being struck by a backing train in charge of the rear brakeman who negligently failed to slow up or stop in time to avoid the injury.

Master and Servant—Injury to Person Walking Near Track—Sufficiency of Evidence.—In an action for injury to plaintiff while walking alongside a spur track, from being struck by a backing train in charge of the rear brakeman, evidence held to sustain a finding that the brakeman was negligent in failing to stop the train in time to avoid the injury.

Master and Servant—Injury to Employee—Liability of Master—Assumption of Risk.—A railroad employee, while walking alongside a spur track in going from his day's work to return his tools and make his daily report, does not assume the risk of being struck by a backing train approaching him from the rear without giving the customary warning signal.

Master and Servant—Injury to Employee—Assumption of Risk—Burden of Proof.*—In a railroad employee's action against a railroad for injuries from being struck by a backing train while he was walking alongside a spur track, the burden was on defendant to show that plaintiff appreciated the risk and assumed it.

Report from Superior Court, Suffolk County; John F. Brown, Judge.

*For the authorities in this series on the subject of the burden of proving assumption of risk by a railroad employee, see foot-note of Chicago, etc., R. Co. v. Heerey (Ill.), 9 R. R. R. 26, 32 Am. & Eng. R. Cas., N. S., 26, where all those preceding it are collected; last foot-note of Baltimore, etc., R. Co. v. Taylor (C. C. A.), 41 R. R. R. 717, 64 Am. & Eng. R. Cas., N. S., 717.

Flaherty v. New York Central & H. R. R. Co

Action by Michael Flaherty against the New York Central & Hocking River Railroad Company. On report. Judgment for plaintiff.

Jas. J. McCarthy, of Boston, for plaintiff.

G. L. Mayberry, of Boston, for defendant.

DE COURCY, J. The plaintiff was walking from the Trinity Place station to the Huntington Avenue yards of the defendant, for the purpose of returning his tools and delivering the usual written statement of his day's work. Along the middle of the railroad location there was a fence; and north of this was the main track for out-bound passenger trains and a spur track which led into the yards. Flaherty was walking alongside this spur track and close to a fence that formed the northerly bound of the location when he was struck from behind by a train of empty cars that was backing out from the South Station to the yards.

[1, 2] The path traveled by the plaintiff was a dangerous one, but we cannot say as matter of law that he was not exercising due care. For years this route had been used commonly and openly by employees of the defendant, "bosses, foremen, brakemen, conductors, car-cleaners, men and women." And upon the plaintiff's testimony this was the only permissible way to reach the yards, as his foreman had forbidden him to go around by the street and told him to go down the track. Further there was ample evidence that it was customary for the rear brakeman on trains that were being backed down to the yards to blow the whistle on the air hose as a warning signal at this place, and to look out for persons on or near the track. The plaintiff said that he knew of and relied somewhat upon this custom and that no signal was sounded from the train that injured him. According to his testimony he not only listened for the usual whistle or bell of any approaching train, but took the further precaution of looking behind him a number of times during the minute and a half that he was on or near the track. The main track would have been a still more dangerous place for him on account of the frequency of passenger trains. We are of opinion that it was for the jury to determine the weight to be given to this evidence and to pass upon the due care of the plaintiff. *Hines v. Stanley G. I. Electric Mfg. Co.*, 199 Mass. 522, 85 N. E. 851; *Santore v. N. Y. C. & H. R. R.*, 203 Mass. 437, 89 N. E. 619; *Anthony v. N. Y., N. H. & H. R. R.*, 208 Mass. 11, 94 N. E. 300.

[3, 4] The evidence would warrant a finding that the injury was due to the negligence of Whalen, the rear brakeman on train 10. He was in charge or control of the train, which he could slow up or stop by applying the air brakes; and for his negligence the defendant is responsible. R. L. c. 106, § 71. He

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admittedly knew that employees were likely to be on and near the track at the place of the accident, and especially at that hour; he testified that it was his business "to look out for anybody or signals, everything;" that his hand was on the valve and by turning it he could check or stop the train which was entirely within his control; and that a man on the rear platform would have no difficulty in seeing a person who was walking near the fence. The place was well lighted, yet for some unexplained reason Whalen failed to see the plaintiff before the accident. Upon the evidence the jury would be warranted in finding that the accident was due to his failure to stop the train before the plaintiff was injured. *Steffe v. Old Colony R. R.*, 156 Mass. 262, 30 N. E. 1137; *Hines v. Stanley G. I. Electric Mfg. Co.*, 199 Mass. 522, 85 N. E. 851.

[5, 6] The defense of assumption of risk is not set up in the answer, but counsel have raised no question of pleading. Under the doctrine of contractual assumption of risk the defendant owed no legal duty to the plaintiff to protect him from the dangers that were incidental to his employment as ordinarily and carefully conducted. Here however it could be found that the plaintiff's injury was due to a risk that was not usual or ordinary, namely, the approach of a train without the customary warning signal, and the subsequent negligent failure to stop the train. The negligence of the defendant or of those for whose neglect it is legally responsible, is not assumed by the plaintiff. To rule that the defendant owed the plaintiff no protection from the consequences of its own neglect would be to nullify the statutory provision which expressly imposed upon the defendant a duty towards the plaintiff. Here, as generally, it is for the jury to say whether the plaintiff appreciated the risk of the danger from which he suffered and voluntarily assumed it. And the burden of sustaining this issue is upon the defendant. *Leary v. William G. Webber Co.*, 210 Mass. 68, 96 N. E. 136.

In accordance with the report, judgment is to be entered for the plaintiff in the sum of \$2,500. So ordered.

MACKENZIE v. NEW YORK CENT. & H. R. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, May 23, 1912.)

[98 N. E. Rep. 585.]

Master and Servant—Action for Death—Question for Jury—Due Care of Deceased.—On evidence in an action to recover damages for the death of a fireman on defendant's switching engine, held, that the question of the deceased's due care was for the jury.

Appeal and Error—Report—Issues.—Where no question of pleading is raised by the report in an action for damages for the death of a fireman on defendant's switching engine, it will be assumed that the defense of assumption of risk is open to defendant.

Master and Servant—Assumption of Risk—Operation of Railroads—Switching Cars.*—The rule that a railroad employee assumes the risk of permanent structures in dangerous proximity to the track has no application to a box car kicked upon the side track, and standing so close to the lead track that the cab of the switching engine cleared its corner by only from three to six inches.

Master and Servant—Assumption of Risk—Negligence of Fellow Servant.†—A fireman on a switching engine at a freightyard does not assume the risk of the negligence of the conductor in charge of the work.

Master and Servant—Action for Injuries—Question for Jury.—On evidence in an action for the death of a fireman on a switching engine at a freightyard, held, that the negligence of the conductor in charge of the work was for the jury.

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Lexie Mackenzie against the New York Central & Hudson River Railroad Company. Judgment directed for defendant, and case reported. Judgment ordered to be entered for plaintiff in the sum of \$2,500 in accordance with the report.

*For the authorities in this series on the question whether railroad employees assume the risks from structures or objects over or near tracks, see extensive note, 8 R. R. R. 548, 31 Am. & Eng. R. Cas., N. S., 548; third foot-note of *St. Louis, etc., Ry. Co. v. Conley* (C. C. A.), 42 R. R. R. 593, 65 Am. & Eng. R. Cas., N. S., 593; *Pike v. Cedar Rapids, etc., Ry. Co.* (Iowa), 41 R. R. R. 445, 64 Am. & Eng. R. Cas., N. S., 445; foot-note of *Louisville & N. R. Co. v. Roe* (Ky.), 40 R. R. R. 332, 63 Am. & Eng. R. Cas., N. S., 332.

†For the authorities in this series on the question whether a conductor is a fellow servant of the other trainmen of his train, see foot-note of *Grout v. Tacoma Eastern R. Co.* (Wash.), 10 R. R. R. 253, 33 Am. & Eng. R. Cas., N. S., 253, where all those preceding it are collected; second paragraph of third foot-note of *Choctaw, etc., Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665.

MacKenzie v. New York Cent. & H. R. R. Co

Jas. J. McCarthy, of Boston, for plaintiff.

Geo. L. Mayberry, of Boston, for defendant.

DE COURCY, J. This is an action under the employer's liability act to recover damages for the death of Alexander W. Mackenzie, who was killed while working as fireman on a switching engine at the Beacon Park freightyard of the defendant. From the northerly main track in the yard ran what was known as a lead track; and with this latter, by means of switches, were connected various side tracks running in an easterly direction and parallel with the main line. The one nearest to the main line was No. 5, and beyond this were Nos. 7, 9, and 11. The accident occurred at about 10:50 in the evening of February 14, 1906, while a switching crew was making up a freight train on No. 11. Cars were temporarily thrown upon the different side tracks, and then withdrawn therefrom and put on No. 11 in their proper order for the trip. A box car with no brakeman riding thereon had been kicked upon No. 5 and was left so near to the lead track that when the engine continued over the lead to track 7 the engine cab cleared the corner of this car by only from three to six inches. Within two minutes later the deceased was found sitting in the fireman's seat, with his head about four inches outside the cab window and his skull fractured; and blood was seen on the corner of the box car at the height of the cab window. The question presented to us is whether the case should have been submitted to the jury.

1. That the plaintiff, the mother and next of kin of the deceased, was dependent upon his wages for support at the time of his death is not controverted by the defendant. *Mehan v. Lowell Electric Light Corp.* 192 Mass. 53, 78 N. E. 385.

[1] 2. Upon the issue of the due care of the deceased there was testimony tending to prove these facts: In the making up of a train the cars were moved in response to signal motions with a lantern, given by the conductor of the switching gang to the middleman, by him passed along to the head end man, and by the last named transmitted to the engineer. When the man giving the signal was in a position where the engineer could not see him, the fireman always took the signal and communicated it to the engineer. Such was the situation when they were going round a curve, and also when the signaling men were on the ground on the fireman's side; because the engineer's view was obstructed by the boiler butt of this engine which extended back through the cab to within eighteen inches of the back board, and was six and a half feet in height above the floor. The fireman's view in the direction the engine was backing was obstructed by the coke rack on top of the tender, which extended seven feet above the floor of the cab and projected three or four inches beyond the sides of the tender. Consequently when watching for

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signals from the men who might be on his side of the track, it was necessary for Mackenzie to put his head out of the cab window. In doing so he might well rely somewhat on the conductor's observance of the established custom not to leave a car too close to an adjoining intersecting track; and in the darkness of the stormy night his failure to perceive the unusual proximity in his track of the box car, before he was brought into contact with it, was not necessarily careless. Upon the evidence the question of the plaintiff's due care was for the jury. *Lury v. N. Y., N. H. & H. R. R.*, 205 Mass. 540, 91 N. E. 1018.

[2-4] As no question of pleading is raised by the report we assume that the defense of assumption of risk is open to the defendant. *Shannon v. Willard*, 201 Mass. 377, 87 N. E. 610; *Leary v. William G. Webber Co.*, 210 Mass. 68, 96 N. E. 136. Clearly it could not be ruled as matter of law that the deceased assumed the risk. The doctrine applying to permanent structures in dangerous proximity to the track has no application here. *Donahue v. B. & M. R. R.*, 178 Mass. 251, 59 N. E. 663. And the negligence of the conductor, upon which the plaintiff relies is not a risk assumed by the latter's contract of employment. *Murphy v. N. Y., N. H. & H. R. R.*, 187 Mass. 18, 72 N. E. 330.

[5] 3. There was also evidence of negligence on the part of Ford, who was the conductor in charge of the shifting work, and for whose negligence the defendant is responsible. The accident was due to leaving the box car on track 5 in dangerous proximity to the adjoining track, when it appears that there was ample space farther down. Ordinarily, in placing the cars the conductor is concerned only with leaving sufficient space to enable cars upon other tracks to clear without colliding. But here the conductor might be found to have known that the fireman, in performing his duty of watching for signals, would be compelled to put his head out of the cab window; and this would impose upon Ford a duty to consider Mackenzie's safety in the placing of the cars. Further it could be found that a custom prevailed in this freightyard not to leave a car where a person could reach it when standing outside the adjacent track and measuring the width of his body and the length of his arm; and the conductor testified that if the car is within that distance it is unsafe. The box car on track 5 was fully twelve inches nearer than this customary distance from the track upon which the engine was at the time of the accident, as the clear space was only from three to six inches. Nevertheless the conductor, without making any inspection or giving any warning of the danger, signaled to the engineer to back the engine upon track 7. We are of opinion that the case should have been submitted to the jury. *Dacey v. Old Colony R. R.*, 153 Mass. 112, 26 N. E. 437; *Lury*

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v. N. Y., N. H. & H. R. R., 205 Mass. 540, 91 N. E. 1018; *Anthony v. N. Y., N. H. & H. R. R.*, 208 Mass. 11, 94 N. E. 309.

This conclusion renders it unnecessary for us to consider whether there was also evidence for the jury of negligence on the part of the engineer. In accordance with the report judgment is to be entered for the plaintiff in the sum of \$2,500.

So ordered.

PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY, Plff. in Err. *v.* THEODORE A. SCHUBERT.

(Argued April 29, 1912. Decided May 13, 1912.)

[32 Sup. Ct. Rep. 589.]

Commerce—Federal Regulation—Employers' Liability—Accepting Relief Fund Benefit.—Congress had the power to enforce the regulations validly prescribed by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), § 5, by preventing the acceptance of benefits under a contract of membership in a railway relief department from operating as a bar to the recovery of damages for the injury or death of an employee, and by avoiding any agreement to that effect.

Master and Servant—Employers' Liability Act—Acceptance of Railway Relief Fund Benefit.—Stipulations making the acceptance of benefits on account of the injury or death of an employee under a contract of membership in a railway relief department equivalent to a release of the company's liability must be deemed to fall within the condemnation in the employers' liability act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,"—especially in view of the proviso of that section permitting a set-off of any sum which the company may have contributed toward any benefit paid to the employee or his legal representative.

Master and Servant—Employers' Liability Act—Existing Contracts against Liability.—Existing as well as future contracts of the prescribed character fall within the condemnation in the employers' liability act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act."

Commerce—Federal Regulation—Employers' Liability—Invalidating Existing Contracts.—Construing the condemnation in the employers' liability act of April 22, 1908, § 5, of "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability

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created by this act" as embracing an existing agreement under which the acceptance of benefits on account of the injury or death of an employee under a contract of membership in a railway relief department was to release the company from liability does not render the section invalid, since such agreement must necessarily be regarded as having been made subject to the possibility that at some future time Congress might so exert its power to regulate commerce as to render the agreement unenforceable, or impair its value.

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action against a railway company to recover damages for personal injuries sustained by an employee, in which the acceptance of benefits under a contract of membership in the company's relief department was set up as a bar to the action. Affirmed.

See same case below, 36 App. D. C. 565.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney, John S. Flannery, and William Hitz for plaintiff in error.

Messrs. John A. Kratz, Jr., M. J. Fulton, and Joseph W. Cox for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court:

This action was brought by Schubert, the defendant in error, against the Philadelphia, Baltimore, & Washington Railroad Company, to recover damages for personal injuries. He received the injuries on May 13, 1908, while in its service as a brakeman within the District, and they were due to the negligence of a fellow servant.

The company pleaded the general issue, and in addition filed a special plea that Schubert was at the time a member of its "relief fund," under a contract of membership made in 1905, in which it was agreed that the company should apply, as a voluntary contribution from his wages, \$2.10 a month for the purpose of securing the benefits described in certain regulations. These contributions continued from October 18, 1905, to May 13, 1908, the date of the accident. Among the regulations, by which he agreed to be bound, was the following:

"58. Should a member or his legal representative make claim, or bring suit, against the company, or against any other corporation which may be at the time associated therewith in administration of the relief departments, in accordance with the terms set forth in regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such claim shall be withdrawn or suit discontinued. Any compromise of such claim or suit, or judgment in such suit, shall preclude any

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claim upon the relief fund for benefits on account of such injury or death, and the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries, on account of injury or death, shall operate as a release and satisfaction of all claims against the company and any and all of the corporations associated therewith in the administration of their relief departments, for damages arising from such injury or death."

A stipulation that the acceptance of benefits should constitute a release from all claims for damages was also incorporated in the application for membership.

The plea further set forth that the relief fund was formed by voluntary contributions from the employees of the defendant company and other companies in association with it for the purpose, appropriations by the company whenever necessary to make up any deficit, the income or profit derived from investments of the moneys of the fund, and such gifts or legacies as might be made for its use. The companies took general charge of the department, guaranteed the fulfilment of its obligations, became responsible for the safe-keeping of its funds, supplied the necessary facilities for conducting the business of the department, and paid all its operating expenses. On December 31, 1908, the total number of employees of the defendant company was 8,458, of which 6,909 were members of the "relief fund;" during the year 1908 the company contributed, as the cost of administration, the sum of \$21,557.02, and during the period of the plaintiff's membership its total contribution for this purpose was \$57,610.51. In addition, the company furnished the facilities of its mail, express, and telegraph departments free of charge.

It was also alleged that after his injury Schubert (between June, 1908, and August, 1908) had voluntarily accepted benefits amounting to \$79; that he had subsequently presented his claim for damages, in view of which no further payments were made, and that the acceptance of the benefits above mentioned was a bar to his action.

The court sustained a demurrer to the special plea, and Schubert recovered judgment for \$7,500, which was affirmed by the court of appeals.

The questions presented by the assignments of error relate to the validity of the employers' liability act of April 22, 1908, chap. 149 (35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322), under which the action was maintained; and particularly, both to the applicability, and to the validity, if applicable, of § 5 of that act, upon which the court below based its ruling as to the insufficiency of the special plea.

That Congress did not exceed its power, in imposing the liability defined by the statute, has been decided by this court. Sec-

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ond Employers' Liability Cases, 223 U. S. 1, ante, 169, 32 Sup. Ct. Rep. 169. Section 5 provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

With respect to this section, the court said in the case cited: "Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the 5th Amendment to the Constitution, as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164; and *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it." *Second Employers' Liability Cases*, supra, p. 52.

In *Chicago, B. & Q. R. Co. v. McGuire*, supra, the court had before it the amendment, made in 1898, of § 2071 of the Code of Iowa. This section, in the cases within its purview, abrogated the fellow-servant rule, and the amendment provided:

"Nor shall any contract of insurance, relief benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such relief, insurance, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives, after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received."

It was held that the amendment was valid, and hence that the defense based upon the acceptance of benefits could not be sustained. The court said (pp. 564, 572): "Neither the suggested

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excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. . . . Its provision that contracts of insurance, relief benefit, or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance, relief benefit, or indemnity, as well as in other agreements. . . . It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance."

Upon similar grounds, Congress had the power to enforce the regulations validly prescribed by the act of 1908 by preventing the acceptance of benefits under such relief contracts from operating as a bar to the recovery of damages, and by avoiding any agreement to that effect. The question is whether this power has been exercised; that is, whether the stipulation of the contract of membership, asserted in defense, comes within the interdiction of § 5. The former act of June 11, 1906, chap. 3073 (34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316), which was valid as to employees engaged in commerce within the District of Columbia (*Hyde v. Southern R. Co.* 31 App. D. C. 466; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 97, 98, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21), contained explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that act was as follows:

"That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, that upon the trial of such action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative."

But it is urged that the substituted provision—of § 5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose

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of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview "any contract, rule, regulation, or device whatever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act." It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. The statute provides that "every common carrier by railroad in . . . the District of Columbia . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." That is the liability which the act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund, and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute.

If there could be doubt upon this point, it would be resolved by a consideration of the proviso of § 5, which immediately follows the language condemning contracts, rules, regulations, or devices, the purpose of which is to exempt the carrier from liability. It is: "Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." The practice of maintaining relief departments, which had been extensively adopted, and of including in the contract of membership provision for release from liability to employees who accepted benefits, was well known to Congress, as is shown by § 3 of the act of 1906. On specifically providing in that section that neither such contracts, nor their performance, should be a bar to recovery, Congress inserted a proviso permitting a set-off of any sum the company had contributed toward any benefit paid to the employee. When, in the act of 1908, it enlarged the scope of the clause defining the contracts and arrangements for immunity which should not prevail,

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Congress retained the proviso in terms substantially the same. This clearly indicates the intent to include within the statute stipulations which made the acceptance of benefits under contracts of membership in relief departments equivalent to a release from liability. Unless the liability survived the acceptance of benefits, there could be no recovery, and hence no occasion for set-off.

It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of § 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, cannot be doubted. The words, "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act," do not refer simply to an actual intent of the parties to circumvent the statute. The "purpose or intent" of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.

Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

In speaking of the act in question, this court said that "the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees, and to advance the commerce in which they are engaged," there was no doubt that, "in making those changes, Congress acted within the limits of the discretion confided to it by the Constitution." Second Employ-

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ers' Liability Cases, 223 U. S. p. 51, ante, 175, 32 Sup. Ct. Rep. 175. If Congress may compel the use of safety appliances (*Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158), or fix the hours of service of employees (*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621), its declared will, within its domain, is not to be thwarted by any previous stipulation to dispense with the one or to extend the other. And so, when it decides to protect the safety of employees by establishing rules of liability of carriers for injuries sustained in the course of their service, it may make the rules uniformly effective. These principles, and the authorities which sustain them, have been so lately reviewed by this court that extended discussion is unnecessary. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265.

In that case it appeared that in 1871, in settlement of a claim for damages for personal injuries, the plaintiffs had entered into an agreement with the railroad company by which the latter promised that during their lives they should have free passes upon the railroad and its branches. It was held that the company rightfully refused, after the passage of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), further to comply with the agreement, and that a decree requiring the continued performance of its provisions was erroneous. The ground for this conclusion was thus stated (pp. 482-486): "The agreement between the railroad company and the Motleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist. . . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. . . . If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived." See also *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 44 L. ed. 136, 142, 20 Sup. Ct. Rep. 96; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Atlantic*

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Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

We find no error in the rulings of which the plaintiff in error complains, and the judgment of the court below is therefore affirmed.

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(Court of Appeals of Kentucky, May 16, 1912.)

[146 S. W. Rep. 1131.]

Master and Servant—Injuries—What Law Governs.*—Where the accident in which an employee was injured occurred in Tennessee, the rights and liabilities of the parties are to be determined by the laws of that state.

Master and Servant—Fellow Servants.†—Under the Tennessee laws, a railroad engineer and the fireman are fellow servants, so that one cannot recover for injuries resulting from the negligence of the other.

*See first foot-note of *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31, where all the authorities in this series on the subject, preceding it, are collected; last foot-note of *Louisville N. R. Co. v. Melton* (Ky.), 26 R. R. R. 585, 49 Am. & Eng. R. Cas., N. S., 585; first foot-note of *Denver & R. G. R. Co. v. Warring* (Colo.), 24 R. R. R. 531, 47 Am. & Eng. R. Cas., N. S., 531; last head-note of *Davis v. Chesapeake & O. Ry. Co.* (Ky.), 24 R. R. R. 170, 47 Am. & Eng. R. Cas., N. S., 170.

†For the authorities in this series on the question whether the fireman and engineer of the same locomotive are fellow servants, see extensive note, 14 R. R. R. 313, 37 Am. & Eng. R. Cas., N. S., 313; last foot-note of *St. Louis & S. F. R. Co. v. Phillips* (Ala.), 35 R. R. R. 792, 58 Am. & Eng. R. Cas., N. S., 792.

For the authorities in this series on the subject of the fellow servant rule, see third foot-note of *Louisville & N. R. Co. v. Brown* (Ky.), 27 R. R. R. 426, 50 Am. & Eng. R. Cas., N. S., 426; last paragraph of foot-note of *Trussle v. Cincinnati, etc., Ry. Co.* (Ky.), 42 R. R. R. 72, 65 Am. & Eng. R. Cas., N. S., 72; last foot-note of *Henry v. Hudson, etc., R. Co.* (N. Y.), 41 R. R. R. 453, 64 Am. & Eng. R. Cas., N. S., 453; last head-note of *Sloppy v. Pennsylvania R. Co.* (Pa.), 39 R. R. R. 1, 62 Am. & Eng. R. Cas., N. S., 1; *Cleveland, etc., Ry. Co. v. Foland* (Ind.), 37 R. R. R. 637, 60 Am. & Eng. R. Cas., N. S., 637; *Massey v. Milwaukee, etc., Co.* (Wis.), 36 R. R. R. 656, 59 Am. & Eng. R. Cas., N. S., 656; *Illinois Cent. R. Co. v. Hart* (C. C. A.), 36 R. R. R. 220, 59 Am. & Eng. R. Cas., N. S., 220 (comprehensive statement of the fellow servant rule recognized by federal courts); *Wickham v. Detroit United Ry.* (Mich.), 35 R. R. R. 321, 58 Am. & Eng. R. Cas., N. S., 321; *Hoxie v. New York, etc., Co.* (Conn.), 33 R. R. R. 537, 56 Am. & Eng. R. Cas., N. S., 537; *St. Louis, etc., Ry. Co. v. Jamison* (Ark.), 31 R. R. R. 677, 54 Am. & Eng. R. Cas., N. S., 677; *Still v. San Francisco, etc., Ry. Co.* (Cal.), 31 R. R. R. 680, 54 Am. & Eng. R. Cas., N. S., 680; *Indianapolis, etc., Co. v. Kinney* (Ind.), 31 R. R. R. 264, 54 Am.

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Master and Servant—Injuries—Proximate Cause.†—If a railroad fireman was injured by the concurring negligence of the engineer, his fellow servant, and of others, who were not his fellow servants, he may recover if the company was responsible for the negligence of such others.

Master and Servant—Injuries—Sufficiency of Evidence—Negligence of Fellow Servant.—In an action against a railroad company for injuries to a fireman by the engineer running through an open drawbridge, evidence held to show that the engineer was negligent in continuing toward the bridge after a red light was displayed and without waiting for the display of a white light, which was the signal on which he was authorized to proceed.

& Eng. R. Cas., N. S., 264; *Texas & P. R. Co. v. Bourman* (U. S.), 31 R. R. R. 319, 54 Am. & Eng. R. Cas., N. S., 319; *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; *Day v. Louisiana W. R. Co.* (La.), 29 R. R. R. 111, 52 Am. & Eng. R. Cas., N. S., 111; *Lapre v. Woronoco St. Ry. Co.* (Mass.), 28 R. R. R. 219, 51 Am. & Eng. R. Cas., N. S., 210; *Louisville & N. R. Co. v. Brown* (Ky.), 27 R. R. R. 426, 50 Am. & Eng. R. Cas., N. S., 426; *McGinnis v. Chicago, etc., Ry. Co.* (Mo.), 22 R. R. R. 715, 45 Am. & Eng. R. Cas., N. S., 715; *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724 (employees may by giving notice cast risk of habitual negligence of their fellow servants upon the master); *Lindgren v. Minneapolis St. L. R. Co.* (Minn.), 3 R. R. R. 171, 26 Am. & Eng. R. Cas., N. S., 171; *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 18 R. R. R. 176, 41 Am. & Eng. R. Cas., N. S., 176; *Northern Alabama Ry. Co. v. Mansell* (Ala.), 11 R. R. R. 186, 34 Am. & Eng. R. Cas., N. S., 186; *Perez v. San Antonio & A. P. Ry. Co.* (Tex.), 2 R. R. R. 354, 25 Am. & Eng. R. Cas., N. S., 354; *Louisville & N. R. Co. v. Wyatt* (Ky.), 20 R. R. R. 413, 43 Am. & Eng. R. Cas., N. S., 413; *Peterson v. New York, etc., R. Co.* (Conn.), 15 R. R. R. 772, 38 Am. & Eng. R. Cas., N. S., 772; *Mollhoff v. Chicago, etc., R. Co.* (Okla.), 19 R. R. R. 709, 42 Am. & Eng. R. Cas., N. S., 709; *Hicks v. Southern Ry. Co.* (S. Car.), 21 Am. & Eng. R. Cas., N. S., 217; *O'Neill v. Great Northern Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 415; *Nolan v. New York, etc., R. Co.* (Conn.), 10 Am. & Eng. R. Cas., N. S., 637; *Blomquist v. Great Northern Ry. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 439; *Creswell v. Wilmington & N. R. Co.* (Del.), 14 Am. & Eng. R. Cas., N. S., 625; *Illinois Cent. R. Co. v. Josey* (Ky.), 20 Am. & Eng. R. Cas., N. S., 869; *Louisville & N. R. Co. v. Stuber* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 840; *Missouri Pac. Ry. Co. v. Lyons* (Neb.), 12 Am. & Eng. R. Cas., N. S., 610; *Railey v. Garbutt* (Ga.), 20 Am. & Eng. R. Cas., N. S., 211; *Smith v. St. Louis, etc., R. Co.* (Mo.), 14 Am. & Eng. R. Cas., N. S., 609; *Swisher v. Illinois Cent. R. Co.* (Ill.), 16 Am. & Eng. R. Cas., N. S., 421; *Louisville & N. R. Co. v. York* (Ala.), 23 Am. & Eng. R. Cas., N. S., 470; *Hicks v. Southern Ry. Co.* (S. Car.), 21 Am. & Eng. R. Cas., N. S., 217; *Chesapeake & O. R. Co. v. Hennessey* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 515; *Pagan v. Southern Ry. Co.* (S. Car.), 28 R. R. R. 254, 51 Am. & Eng. R. Cas., N. S., 254; *Maloney v. Florence, etc., R. Co.* (Colo.), 23 R. R. R. 145, 46 Am. & Eng. R. Cas., N. S., 145; *Louisville & N. R. Co. v. Dillard* (Tenn.), 17 R. R. R. 762, 40 Am. & Eng. R. Cas., N. S., 762.

†For the authorities in this series on the question whether the master is liable for an injury to his servant caused by the negli-

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Master and Servant—Injuries—Sufficiency of Evidence—Proximate Cause.—Evidence, in an action for a railroad fireman's death by running through an open drawbridge, held to show that the engineer's negligence in proceeding before a white light was displayed at the drawbridge was the proximate cause of the accident.

gence of the latter's fellow servant concurring with that of the master or one of his employees who is not a fellow servant of the injured servant, see *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 35 R. R. R. 48, 58 Am. & Eng. R. Cas., N. S., 48 (brakeman because of failure of master to provide derailer was entitled to recover though negligence of his fellow concurred with that of his master); *Hoxie v. New York, etc., Co.* (Conn.), 33 R. R. R. 537, 56 Am. & Eng. R. Cas., N. S., 537; *Chicago & E. I. R. Co. v. Kimmel* (Ill.), 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384; *Conine v. Olympia Logging Co.* (Wash.), 22 R. R. R. 568, 45 Am. & Eng. R. Cas., N. S., 568; *Stone v. Union Pac. R. Co.* (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119; *Bodie v. Charleston, etc., Ry. Co.* (S. Car.), 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95; *Hicks v. Southern Pac. Co.* (Utah), 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332; *Merrill v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 221, 42 Am. & Eng. R. Cas., N. S., 221; *Moore v. St. Louis Transit Co.* (Mo.), 20 R. R. R. 444, 43 Am. & Eng. R. Cas., N. S., 444; *Pennsylvania R. Co. v. Jones* (C. C. A.), 9 R. R. R. 111, 32 Am. & Eng. R. Cas., N. S., 111; *Root v. Kansas City Southern Ry. Co.* (Mo.), 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; *Gila Valley, etc., Ry. Co. v. Lyon* (Ariz.), 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745 (master's liability depends on which is proximate cause); *Chicago Union Traction Co. v. Sawusch* (Ill.), 18 R. R. R. 856, 41 Am. & Eng. R. Cas., N. S., 856; *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795; *Cole v. St. Louis Transit Co.* (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624; *St. Louis Nat. Stock Yards v. Godfrey* (Ill.), 7 R. R. R. 28, 30 Am. & Eng. R. Cas., N. S., 28, *St. Louis, etc., R. Co. v. Robertson* (Ark.), 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78; *Chicago & A. R. Co. v. Wise* (Ill.), 10 R. R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8; *Gordon v. Chicago, etc., Ry. Co.* (Iowa), 18 R. R. R. 646, 41 Am. & Eng. R. Cas., N. S., 646; *Fuller v. Tremont Lumber Co.* (La.), 17 R. R. R. 710, 40 Am. & Eng. R. Cas., N. S., 710; notes, 17 Am. & Eng. R. Cas., N. S., 570, 12 Am. & Eng. R. Cas., N. S., 791; *Pool v. Southern Pac. Co.* (Utah), 16 Am. & Eng. R. Cas., N. S., 551; *Kansas City, etc., R. Co. v. Becker* (Ark.), 16 Am. & Eng. R. Cas., N. S., 348; *Louisiana, etc., Ry. Co. v. Carstens* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 781; *Fluhrer v. Lake Shore & M. S. Ry. Co.* (Mich.), 17 Am. & Eng. R. Cas., N. S., 464.

For the other authorities in this series on the subject of concurring negligence, see foot-note of *Richmond Traction Co. v. Martin's Adm'x* (Va.), 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817, where all those preceding it are collected; last paragraph of first foot-note of *Hammers v. Colorado, etc., R. Co.* (La.), 41 R. R. R. 414, 64 Am. & Eng. R. Cas., N. S., 414; last foot-note of *Plinkiewisch v. Portland, etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; last head-note of *Exum v. Atlantic C. L. R. Co.* (N. Car.), 40 R. R. R. 460, 63 Am. & Eng. R. Cas., N. S., 460; fifth head-note of *Central of Georgia Ry. Co. v. Blackmon* (Ala.), 39 R. R. R. 292, 62 Am. & Eng. R. Cas., N. S., 292.

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Master and Servant—Injuries—Contributory Negligence—Disobedience of Rules.§—Rules allowing railroad trainmen to proceed only upon the giving of safety signals and to stop upon seeing danger signals must be literally obeyed, and trainmen cannot recover for injuries resulting from their disobedience of such rules.

Navigable Waters—Operation of Drawbridge—Negligence by Bridge Tender.—Since the rules prescribed by the federal government require drawbridge tenders to open the draw when a signal therefor is received from any steamboat, a drawbridge tender would not be negligent for opening the draw in answer to the signal, though he knew that the boat could pass under the bridge without opening it, unless there was a train or wagon over the draw or so close thereto that the draw could not be safely dropped.

Appeal from Circuit Court, Barren County.

Action by John S. Moran against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed for further proceedings as directed.

Sims & Rodes, of Bowling Green, and *Benjamin D. Warfield*, of Louisville, for appellant.

B. F. Procter, of Bowling Green, and *Hazelrigg & Hazelrigg*, of Frankfort, for appellee.

CARROLL, J. The appellee, Moran, was the fireman, and W. F. Porter, the engineer, on a railroad engine that went through an open drawbridge, that had been opened for the purpose of permitting a steamboat to pass through. The engineer, Porter, was killed, and Moran, the fireman, seriously injured. To recover damages for the injuries sustained, Moran brought this action against the appellant company and upon a trial before a jury was awarded \$4,000.

[1] As the accident happened in the state of Tennessee, the rights of the plaintiff and the liability of the company are to be determined by the laws of that state. *L. & N. R. Co. v. Smith*, 135 Ky. 462, 122 S. W. 806.

[2] Under the laws of Tennessee, the engineer and fireman are fellow servants, and no recovery can be had by one on ac-

§For the authorities in this series on the contributory negligence of servants in violating the rules or orders of the master, see foot-note of *Schlemmer v. Buffalo*, etc., Ry. Co. (Pa.), 10 R. R. R. 240, 33 Am. & Eng. R. Cas., N. S., 240, where all those preceding it are collected; first foot-note of *Bunker v. Union Pac. R. Co.* (Utah), 42 R. R. R. 49, 65 Am. & Eng. R. Cas., N. S., 49; last foot-note of *St. Louis*, etc., Ry. Co. v. *Webster* (Ark.), 41 R. R. R. 687, 64 Am. & Eng. R. Cas., N. S., 687; *Pounds v. Chicago Great Western R. Co.* (Minn.), 41 R. R. R. 437, 64 Am. & Eng. R. Cas., N. S., 437; second foot-note of *Gilbourne v. Oregon Short Line R. Co.* (Utah), 41 R. R. R. 86, 64 Am. & Eng. R. Cas., N. S., 86; *Louisville & N. R. Co. v. Murphy* (Ky.), 40 R. R. R. 632, 63 Am. & Eng. R. Cas., N. S., 632.

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count of injuries sustained by the negligence of the other. *L. & N. R. Co. v. Keiffer*, 132 Ky. 419, 113 S. W. 433. This being so, the appellee rested his right to recover upon the negligence of the bridge tenders who had charge of the drawbridge that was open at the time the injury complained of occurred, although an unsuccessful effort was made to show negligence on the part of the conductor of the train. We may therefore say, at the very outset, that whether or not appellee was entitled to recover damages depends entirely upon the question whether or not the bridge tenders were negligent in the performance of their duties, for, if they were not negligent, the appellee failed to make out a case to go to the jury. Perceiving that this was the real question in the case, practically all of the evidence introduced in behalf of the appellee was directed by his counsel to establishing the negligence of these bridge tenders in two respects: First, in failing to give proper signals to the engineer that the drawbridge was open; and, second, in opening it when they knew it was not necessary that it should be opened, and also knew that the train was due. On the other hand, counsel for the railroad company predicated their defense upon the proposition that the accident was due solely to the negligence of the engineer. It is true there is some attempt to show that appellee, Moran, was guilty of negligence; but we do not think it necessary to take any time upon this issue, as there is no evidence of his negligence in the record.

[3] If the injuries sustained by appellee were the result solely of the negligence of the engineer, he cannot recover; but if they were the result solely of the negligence of the bridge tenders, he can recover. But, as the issue is sharply made as to whether the accident was due solely to the negligence of the engineer or solely to the negligence of the bridge tenders, we may state that the decisive question in the case is: Was the accident due to the negligence of the engineer or the negligence of the bridge tenders?

[4] The train to which the accident occurred was a passenger train coming north on its way from Paris, Tenn., to Bowling Green, Ky., and consisted of an engine and five passenger coaches. The engine and two of the coaches went through the open bridge, while the other coaches remained standing on the track. The accident happened about 8 o'clock in the evening, in September, 1906; and at the time the train was a few minutes behind its regular schedule time. The bridge which spans Cumberland river is 675 feet long; the draw span being in the center of the river, with a stationary span on each end of the draw span. The stationary span on the south side of the river, from which the train was approaching, is 215 feet long, and there is a trestle extending south from this stationary span 2,200 feet. On the trestle and 329 feet from the south end of the draw span and 114 feet from

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the south end of the stationary span there is a stop board with the word "stop" on it.

The rules of the company, and which were put in evidence by appellee, regulating the movement of trains at this bridge, provide that: "Enginemen will at all times when approaching drawbridges give four short blasts of the whistle when opposite the signal post situated one-half mile from each drawbridge. A danger signal is displayed in the center of each draw span, inside the span, at all times, except when removed for passage of trains. A safety signal, as provided in rule 60, indicates that draw is in proper position for passage of trains. Enginemen of all trains must approach all drawbridges with their trains under full control, and must not pass the signal post erected at each drawbridge until the danger signal is removed and the safety signal displayed, which must be done in their view. In case of failure to display these signals, as herein directed, enginemen must be governed by rule 65, and must know that the drawbridge is in proper position before proceeding. Trains must not exceed a speed of six miles per hour in passing drawbridges. Draw tenders must display the proper signals as provided in the foregoing rules and must not attempt to change signals from danger to safety until they know that enginemen can plainly see the change made." It is also shown by the evidence of appellee that a white light raised and lowered vertically is a safety signal, or a signal to move ahead; or, as said in rule 60: "A lamp raised and lowered vertically is a signal to move ahead." Another rule provides that "A signal imperfectly displayed, or the absence of a signal where a signal is usually shown, must be regarded as a danger signal." The rules also provide that a red light at night signifies danger, and means that the train must come to a stop.

The rules governing the opening of drawbridges to permit the passage of boats are prescribed by the United States government, and these rules, among other things, provide that: "Whenever a steamboat approaches any drawbridge, and desires to pass through the draw thereof, the officer or person in charge of said steamboat shall cause to be sounded when said boat is within twenty minutes run of the bridge four distinct blasts of the steam whistle, and shall repeat the same at intervals of five minutes until it is seen from the boat that the signal is understood on the bridge and that the bridge is being opened. Upon hearing the signal prescribed, the tenders or operators of the drawbridge shall at once open the draw spans of the bridge for the prompt passage of said steamboat, provided that the draw may not be opened when there is a train, wagon or vehicle at the time passing over said draw span, or a train approaching so closely that it cannot be safely stopped before reaching the bridge."

The appellee in his own behalf testified that Porter, the engineer, after he came on the trestle, sounded four blasts of the whis-

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tle, calling for a signal from the bridge tenders, and in a moment afterwards sounded two short blasts, indicating that he had received the safety signal from the tenders; that, when he called for the signal, the bridge tender picked up the red light, and the engineer released the brake, which he had put in service application shortly before giving the four blasts, the effect of which was to increase the speed of the train; that in a moment afterwards the emergency brakes were applied, and he then saw that the drawbridge was open, and jumped, or attempted to jump, from the engine. He was asked these questions: "Q. Now, what signal did the bridge tender give to Porter that caused him to give the two short blasts? A. He picked up the red lantern, red light. Q. Was that bridge safe at that time? A. No, sir. Q. When he picked up that red light, what did that indicate to Porter? A. Indicated safety. Q. Did Porter have his brake applied at the time he picked up the red light? A. Yes, sir. Q. If Mr. Porter had not released the brake when that red light was picked up, how far would his train have gone, with the air pressure he had on it, before it would have stopped? A. I don't think the train would have passed the stop board. Q. How many red lights did you see on that bridge? A. Saw one. Q. Where was that red light according to your judgment when you first saw it? A. In the middle of the draw. Q. When he picked up that red light, what did he do with it? A. He picked it up in his hand, and I moved down in the deck; I don't know what he did with it. Q. Did you see any lights about this bridge, or lamps or signals anywhere except the red light that the bridge tender had? A. No, sir. Q. What signal was it customary to give after he picked up the red light, provided the track was safe? A. Give a signal with a white light—white signifies safety." On his cross-examination, he said: "Q. How is that white safety signal given, which you spoke of a while ago? A. It is given by the bridge watchman. Q. How? A. By raising and lowering. Q. A white light or lantern? A. Yes, sir. Q. Vertically raising and lowering a white lantern? A. Yes, sir; that means come ahead. Q. You never saw any signal but the red light? A. That is all. Q. Only the one? A. Yes, sir."

Morris, the baggageman on the train, was asked these questions: "Q. You say that a red flag or lamp is used for the purpose of stopping trains; if it was desired at that time to cause that train to stop or proceed, what was the proper plan if they wanted that train to stop? A. He should have a stationary red lamp and used the stop signal with the white. Q. What would it indicate at that time to an engineer approaching a station where a red lamp was stationed to remove the lamp? A. It would indicate that everything was safe for him to proceed when the red lamp was removed." On his cross-examination, he was asked: "Q. What is the proper signal given

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at night to proceed over that bridge? A. I know that they always went 'out, and the bridge flagman would pick up the red light, and signed the engineer ahead, if everything was all right, waved for him to proceed. Q. Well, how? A. Well, he would simply pick up the red light and flag him ahead with the white light. Q. Flag him ahead with what? A. A white lamp. Q. If a man hasn't gotten the white light, and has a red lamp in his hand at that time, is that a signal of danger? A. Yes, sir. Q. If the man stands in the tracks with a red lamp in his hand, is it a danger signal? A. A red lamp always signifies danger. Q. If he waves it across his body that way, or across the track, what is it? A. Danger. Q. If it is stationary in the track, what is it? A. Danger."

The conductor on the train, introduced as a witness for appellee, was asked: "What was the duty of that bridge watchman there if he wanted that train to stop? Should he have moved that red light at all? A. No, sir. Q. He ought to have left it on the track, even if the train ran over it? A. That is what I would have done; it is a danger signal either way. Q. You do know that red light is there all the time on that span? A. Yes, sir. Q. When and under what circumstances should he remove that red light? A. He removes it when the draw is all right. Q. He first removes the red light and then gives the signal with a white light? A. That is right." On his cross-examination, he was asked: "Q. When you said it was the bridge tender's duty to let the red light stay in the middle of the track on the bridge, did you mean that it would be improper for him to pick it up? A. No, sir; I did not mean it would be improper. Q. If he did do such a thing as that, state whether or not it would still be a danger signal. A. It would still be a danger signal, no matter what position it was in. Q. You said that the bridge watchman, if he wanted Porter to come on with your train, should have first removed the red light, and then have given the signal you have mentioned with the white light? A. That is right. Q. Now, state what was the duty of your engineer to do—to wait for that white light signal before approaching the bridge? A. Yes, sir. Q. Was it his duty to wait until he did get the white light signal? A. Yes, sir."

Mrs. Hoge was introduced in behalf of appellee, and said that she was near the bridge and saw the train approaching. She said, in substance, that she saw the bridgeman standing on the south stationary span of the bridge, waving a red light; that she did not see the light until he picked it up and commenced waving it, at which time the train was right close.

J. R. Manning, a witness for the appellee, and who lived close to the bridge, testified that: "The bridge watchman, when he blew for the signal, was standing on the right side of the track

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with his white light in his left hand. He reached to the red light, picked up the red light, and then set the white light down on the right side of the track. He either walked rapidly or ran about, I should judge, 6 or 7 paces towards the engine, and began to wave the red light back and forth. He remained in that position until the train had gotten within a few feet of him. He then stepped aside on the engineer's side, and ran back probably the length of one car, I suppose to get out of danger of the train going over him. Q. When this man on the bridge set down the white light, did he move that white light any more, or did that remain there? A. I think it remained there. Q. When he started back, meeting the train with the red light, did he have it in his hand? A. No, sir. Q. I mean, did he have a red light in his hand? A. Yes, sir; a red light in his hand. Q. Did he leave the white light back? A. Yes, sir. Q. How far was the engine from him when he picked up the red light and started towards it? A. Well, he might have been 75 feet, I don't know exactly; the engine was on the fixed span of the bridge when he picked up the red light."

Ross, one of the bridge tenders, testified that he was on the draw span, in the engine room, which is situated in the middle of the draw span, and was engaged in opening the draw span for the purpose of letting a boat go through that had given the blasts of its whistle indicating that it was calling for the draw. Asked: "When it whistled, what did you begin to do? A. When it whistled, I started out to the draw to put the red lights out. When the red lights were out, I went in the engine room to open the draw." While he was in the engine room, he saw the engine and cars go through the open draw. On his cross-examination, he said that he knew the train was behind time a few minutes, and that when he started to the engine room, Ingram, the other bridge tender, was going to put a red light on the north end of the stationary south span; that there was at the time a red light in the middle of the draw span; that there were three red lights put out—one on the south end of the north stationary span, one in the center of the draw span, and one on the north end of the stationary south span. He also testified that they had a white light there for the purpose of giving signals with, and that Ingram took the white light with him when he went over to the south stationary span. He also testified it would take about 7 or 8 minutes to open and close the drawbridge.

W. C. Ingram, the other bridge tender, said that when the steamboat blew for the drawbridge, that Ross went up to start the engine to open the drawbridge, and he went out to set the signals; that he first set the signal, which was a red lantern, on the south end of the north stationary span, and then placed another red lamp in the center of the draw span, and then went

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to the north end of the south span and placed another red lantern; that when he had done this, Ross asked him if the signals were all right, and upon his answering that they were, Ross commenced to open the draw, and he stepped onto the stationary south span; that about the time he stepped onto the stationary south span, he heard the train whistle for the station, and also blow four short blasts of the whistle, which was the signal for the draw tender, and in quick succession answered by two short blasts, and come right on by the stop board, and onto the stationary south span; that when he was about halfway across the south span, running towards the open draw, he picked up the red light, and swung it backwards and forwards across the track; but the approaching train did not stop. He further testified that he did not give any signal with a white light.

This is the substance of all of the material evidence relating to the acts and conduct of the bridge tenders and the engineer. It appears from this evidence that the engineer gave four short blasts of the whistle at the usual place as he approached the bridge, and soon afterwards gave two short blasts, indicating that he had received a signal to proceed. But there is no evidence, nor is there any fact or circumstance from which it can be reasonably inferred, that the engineer ever received a safety signal or a signal to proceed, or that the bridge was safe. The only witness who testified to any movement of the white light by the bridge tender said, in effect, that the bridge tender had a white light in his hand as the train was approaching, and set it down on the track and picked up a red light, which he waved across the track. Before the bridge tender picked up the red light, it was in plain view of the engineer. The fireman and other witnesses saw it, and the engineer could not have failed to see it if he was keeping a lookout. It was an imperative sign of danger, and an imperative signal to stop—especially was this true at this dangerous place. The bridge tender was not negligent in having a white light in his hand, as it was necessary that he should have this light to give the safety signal when the time came to give it. His only purpose in setting down the white light and in picking up the red light and waving it to and fro was that he might better attract the attention of the engineer to the danger signal that he had disregarded. The evidence of witnesses that the act of the bridge tender in picking up the red light was a signal of safety is entitled to no consideration in the face of the positive rules of the company. It is inconceivable how the act of picking up a red light could be a signal of safety, when the rules positively say that the red light is always a signal of danger and that the only signal of safety was a white light raised and lowered vertically. It is, we think, conclusively shown by the evidence that the engineer was negligent in coming to the drawbridge without having received the safety

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signal or the signal to proceed, which was a white lamp raised and lowered vertically. The fact that the bridge tender picked up or had a white light in his hand, or the fact that he set down the white light and picked up a red light, cannot be construed into a safety signal of any sort or character. The safety signal could only be given in one way, and there is not a particle of evidence that it was given in the way prescribed by the rules, or in any similar way, or in any way that could have deceived any reasonably prudent person into the belief that it was a safety signal. Indeed, the engineer was guilty of the double negligence, of proceeding in the face of a red light, always a warning of danger and a signal to stop, and without waiting for the proper signal from the white light, which was the only authority he could have to proceed. The conduct of the engineer in failing to wait for the regular and usual signal with the white light is attempted to be excused upon the ground that the act of the bridge tender in setting down the white light and in picking up the red light, as testified to by Manning, deceived the engineer into the belief that the vertical signal had been given with the white light. And, in this connection, we are referred to a rule providing that "a bridge signal is displayed in the center of each draw span inside the span at all times, except when moved for the passage of trains." But this rule has no relation to the case whatever, and the act of the bridge tender in setting down the white and picking up the red lantern was in no manner or form a vertical signal to proceed.

[5] The fact is that the engineer, under all the rules regulating the movement of the train at drawbridges, was guilty of a high degree of negligence in proceeding before receiving a safety signal, and that this disobedience of the rules on his part was the sole and proximate cause of the accident is as plain as evidence can make it.

[6] It is indispensable to the safety of the traveling public that rules like the ones we have been considering should be literally obeyed by trainmen, and when a trainman whose duty it is to obey these rules is injured as a result of their violation, it is well settled that he cannot recover damages from the company. As said in *Sinclair's Adm'r v. I. C. R. Co.*, 100 S. W. 236, 30 Ky. Law Rep. 1040: "Absolute obedience to orders regulating the movement of trains is indispensable to the safety of life and the protection of property, and carriers engaged in the hazardous business of transportation by modern methods have the right to demand the highest efficiency in the service, and to exact implicit obedience to the orders of superiors, and to establish and enforce rules for the discipline of their employees. It is not the purpose of the courts to encourage in any way violations by employees of reasonable rules by relieving them of the consequences of their wrongful acts, or to subject the com-

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pany to damages caused by their disobedience." In *L. & N. R. Co. v. Scanlon*, 60 S. W. 643, 22 Ky. Law Rep. 1400, we said: "The responsible trainman who violates such reasonable rules, of which he has knowledge, and which he has undertaken to regard, must needs take upon himself the personal consequences of his dereliction. If injury results to him by reason of such violation, and which would not, in any probability, have occurred but for it, he alone should suffer the consequences of his fault." See, also, *L. & N. R. Co. v. Sewell*, 142 Ky. 171, 134 S. W. 162; *C., N. O. & T. P. R. Co. v. Lovell*, 141 Ky. 249, 132 S. W. 569; *C., N. O. & T. P. R. Co. v. Silvers*, 126 S. W. 121. If the action had been brought by the personal representative of Porter to recover damages for his death, and the evidence was the same as the evidence in the record before us, it is clear that no recovery could be had, and under the law of Tennessee, Moran occupies no better position than would the personal representative of Porter.

It is scarcely necessary to notice the question that the bridge tenders were negligent in opening the bridge at the time they did for the purpose of permitting an approaching steamboat to pass through, as there is a total failure of evidence to support this ground of negligence. There is evidence conducing to show that the bridge tenders knew the name and size of the boat that signaled for the draw to open, and the height of its chimneys, and that this boat could have passed under safely without the draw having been opened. In fact, on this occasion it did pass under the stationary span.

[7] But, under the rules prescribed by the United States government, it was the duty of the bridge tenders to open the draw when a signal for this purpose was received from a steamboat, and that they did receive such signal is not denied. They were not required to take any chances on boats passing safely under the bridge. In no contingency, except the one we will presently notice, would it be negligence on the part of the bridge tenders to open the draw in answer to the signal that it be opened, although they might know that the boat calling for the draw to be opened could pass safely under the bridge without opening it. But if there was a train or wagon or vehicle passing over the draw, or a train approaching so closely that it could not be safely stopped before reaching the bridge, then it would be the duty of the bridge tenders to keep the bridge closed until the vehicle or train had passed over it or reached a safe place, and any failure to observe this safeguard for the protection of life and property would, of course, be negligence on their part for which an action would lie. But when the bridge tenders started to open the draw, the train was so far from the bridge that no question is made that it could not have been stopped long before

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reaching the bridge, if the engineer had observed the rules governing the movement of his train.

Under the evidence, the motion for a peremptory instruction on behalf of appellant should have been sustained.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

EDGAR G. MONDOU, Plff. in Err. v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

NORTHERN PACIFIC RAILWAY CO., Plff. in Err. v. BESSIE BABCOCK, Administratrix.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., Plff. in Err., v. MARY AGNES WALSH, Administratrix.

MARY AGNES WALSH, Administratrix, Plff. in Err. v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

(Argued February 20 and 21, 1911. Decided January 15, 1912.)

[32 Sup. Ct. Rep. 169.]

Commerce—Power of Congress—Employers' Liability.—Congress, in the exercise of its power over interstate commerce, may regulate the relations of railway carriers and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Federal Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and employees are engaged.

Commerce—Power of Congress—Employers' Liability.—Congress did not exceed its power to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce by enacting the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), which abrogates the fellow-servant rule, extends the carrier's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk, since no one has any vested right in any rule of the common law, and the natural tendency of such changes is to promote the safety of the employees and to advance the commerce in which they are engaged.

Commerce—Power of Congress—Employers' Liability—Fellow Servants.—The power of Congress, under the commerce clause, to regulate the liability of an interstate railway carrier for the death or injury of an employee engaged in interstate commerce, which may result from the negligence of a fellow servant, is not exceeded by the enactment of the employers' liability act of April 22, 1908,

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although that act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce.

Constitutional Law—Due Process of Law—Freedom to Contract—Employers' Liability.—Congress, possessing the power exercised in the employers' liability act of April 22, 1908, to regulate the relations of interstate railway carriers and their employees engaged in interstate commerce, made no unwarranted interference with the liberty of contract, contrary to U. S. Const. 5th Amend., by declaring in the 5th section of that act that any contract, rule, regulation, or device the purpose or intent of which is to enable the carrier to exempt itself from the liability therein created shall be void.

Constitutional Law—Classification—Due Process of Law—Equal Protection of the Laws—Employers' Liability.—The imposition of the liability created by the employers' liability act of April 22, 1908, upon interstate carriers by railroad only, and for the benefit of all their employees engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce not within the act are exposed, does not invalidate the statute under the due-process-of-law clause of the 5th Amendment to the Federal Constitution, on the ground that it makes an arbitrary and unreasonable classification,—even assuming that that clause is equivalent to the provision of the 14th Amendment securing the equal protection of the laws.

Commerce—Employers' Liability—Conflicting State and Federal Regulations.—The laws of the several states, in so far as they cover the same field, were superseded by the enactment by Congress of the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce.

Courts—Concurrent Jurisdiction—Enforcing Rights under Federal Statute.—The enforcement of rights under the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce, cannot be regarded as impliedly restricted to the Federal courts, in view of the concurrent jurisdiction provision of the judiciary act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), § 1, and of the amendment made by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143), to the original employers' liability act, which, instead of granting jurisdiction to the state courts, presupposes that they already possess it.

Courts—Concurrent Jurisdiction—Enforcing Rights under Federal Statute.—Jurisdiction of an action to enforce the rights arising under the employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce, may not be declined by the courts of a state whose ordinary jurisdiction as prescribed by local laws is adequate to the occasion, on the theory that such

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statute is not in harmony with the policy of the state, or that the exercise of such jurisdiction will be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state.

In error to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New London County in that state sustaining a demurrer to a complaint based upon the Federal employers' liability act. Reversed and remanded for further proceedings. Also—

In error to the Circuit Court of the United States for the District of Minnesota to review a judgment in favor of plaintiff in an action based on the Federal employers' liability act. Affirmed. Also—

Cross writs of error to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiff in an action based on the Federal employers' liability act. Affirmed.

Statement by MR. JUSTICE VAN DEVANTER:
No. 120.

This was an action by a citizen of Connecticut against a railroad corporation of that state, to recover for personal injuries suffered by the plaintiff while in the defendant's service. The injuries occurred in Connecticut August 5, 1908, the action was commenced in one of the superior courts of that state in October following, and the right of action was based solely on the act of Congress of April 22, 1908. [35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171.] According to the complaint, the injuries occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the states, and while the plaintiff, as a locomotive fireman, was employed by the defendant in such commerce, and the injuries proximately resulted from negligence of the plaintiff's fellow servants, who also were employed by the defendant in such commerce. A demurrer to the complaint was interposed upon the grounds, first, that the act of Congress was repugnant in designated aspects to the Constitution of the United States, and, second, that, even if the act were valid, a right of action thereunder could not be enforced in the courts of the state. The demurrer was sustained, judgment was rendered against the plaintiff, the judgment subsequently was affirmed by the supreme court of errors of the state (82 Conn. 373, 73 Atl. 762), upon the authority of *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 A. & E. Ann. Cas. 324, and the plaintiff then sued out the present writ of error.

No. 170.

This was an action by the personal representative of a deceased

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employee of a railroad corporation to recover, for the exclusive benefit of the surviving widow, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Montana, September 25, 1908, the action was commenced in the circuit court of the United States for the district of Minnesota, October 4, 1909, and the right of action was based solely on the act of Congress before mentioned. It appeared from the complaint that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the states, and while the deceased, as a locomotive fireman, was employed by the defendant in such commerce; that the injury proximately resulted from negligence of fellow servants of the deceased, who also were employed by the defendant in such commerce; that the deceased resided in Montana, and died without issue or a surviving father or mother, but leaving a widow and also a sister; and that if the statutes of Montana were applicable, the recovery should be for the equal benefit of the widow and sister, and not for the exclusive benefit of the widow, as prayed in the complaint, and as provided in the act of Congress. The defendant challenged the validity of the act by a demurrer to the complaint, and in the subsequent proceedings insisted that the recovery, if any, should be for the benefit of the widow and sister jointly, and not for the benefit of the widow alone, but the demurrer and the insistence were overruled, and judgment was rendered for the plaintiff for the exclusive benefit of the widow, as prayed. By a direct writ of error the defendant seeks a reversal of that judgment. Nos. 289 and 290.

These writs of error relate to the judgment in a single case. It was an action by the personal representative of a deceased employee of a railroad corporation to recover, for the benefit of the surviving widow and children, for the death of the employee, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Connecticut, February 11, 1909, the action was commenced in the circuit court of the United States for the district of Massachusetts in July following, and the right of action asserted in the second count of the declaration was based on the act of Congress before mentioned. There were several other counts, but they may be passed without special notice. It was charged in the second count that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the states, and while the deceased, in the course of his employment by the defendant in such commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce, and that the injury proximately resulted from negligence of fellow servants of the deceased in

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pushing other cars against the one on which he was working. A demurrer to that count challenged the validity of the act of Congress, but the demurrer was overruled. The defendant answered, putting in issue all that was stated in that count, and also alleging that the deceased, by his own negligence, contributed to the injury which resulted in his death, and therefore that the damages should be diminished in proportion to the amount of negligence attributable to him. A trial to the court and a jury resulted in a verdict and judgment for the plaintiff upon the second count, and there was a judgment for the defendant upon the other counts. Each party has sued out a direct writ of error from this court. The defendant calls in question the ruling upon its demurrer and other rulings in the progress of the cause, notably such as related to the nature of the employment in which the deceased and the fellow servants whose conduct was in question were engaged at the time of the injury, and to the admeasurement of the damages. The plaintiff makes no complaint of the judgment upon the second count, and, if it shall be affirmed, wishes to waive her objections to the judgment upon the other counts.

The act whose validity is drawn in question (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), and the amendment of April 5, 1910 (36 Stat. at L. 291, chap. 143), are as follows:

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to

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any person suffering injury while he is employed by such carrier in any of said jurisdiction, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Sec. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of the common carrier.

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Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employees," approved June eleventh, nineteen hundred and six. [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148].

Approved April 22, 1908.

An Act to Amend an Act Entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," Approved April Twenty-second, Nineteen Hundred and Eight. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Sec. 2. That said act be further amended by adding the following section as section nine of said act:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury."

Approved, April 5, 1910.

Mr. *Donald G. Perkins* for Mondou.

Mr. *Samuel A. Anderson* for Babcock, Administratrix.

Messrs. *Endicott P. Saltonstall* and *George D. Burrage* for Walsh, Administratrix.

Mr. *Charles W. Bunn* for the Northern P. R. Co.

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Messrs. *John L. Hall, Edward D. Robbins, and Joseph F. Berry*, for the New York, N. H. & H. R. Co.

The late Solicitor General Bowers, Attorney General Wickersham, and Special Assistant to the Attorney General, J. C. McReynolds, for the United States as amicus curiæ.

MR. JUSTICE VAN DEVANTER, after stating the cases as above, delivered the opinion of the court:

The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do those regulations supersede the laws of the states in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the states when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (art. 1., § 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce * * * among the several states," and "to make all laws which shall be necessary and proper" for the purpose, have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several states" marks the distinctions, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

3. "To regulate," in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not ex-

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tend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. *Cooley v. Port Wardens*, 12 How. 299, 315-317, 13 L. ed. 996, 1003, 1004; *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 577, 22 L. ed. 654, 662; *Sherlock v. Alling*, 93 U. S. 99, 103-105, 23 L. ed. 819-921; *Smith v. Alabama*, 124 U. S. 465, 479, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Peirce v. Van Dusen*, 69 L. R. A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, 698-700; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 37 L. ed. 772, 776, 13 Sup. Ct. Rep. 914; *Patterson v. The Eudora*, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 495, 52 L. ed. 297, 308, 28 Sup. Ct. Rep. 141; *Adair v. United States*, 208 U. S. 161, 176-178, 52 L. ed. 436, 443, 444, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 55 L. ed. 878, 882, 31 Sup. Ct. Rep. 621; *Southern R. Co. v. United States*, 22 U. S. 20, ante, 2, 32 Sup. Ct. Rep. 2.

As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in

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consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged; and (3) because the act offends against the 5th Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract, and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class, and all their employees engaged in such commerce in a favored class.

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by

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an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested right, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558, 577, 22 L. ed. 654, 662; *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 406, 417, 54 L. ed. 1088, 31 Sup. Ct. Rep. 59.

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottary Case (Champion v. Ames)* 188 U. S. 321, 353, 355, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 A. & E. Ann. Cas. 561; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 203, 55 L. ed. 167, 181, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but

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that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna* (*Rodd v. Heartt*), 21 Wall. 558, 581, 582, 22 L. ed. 654, 664; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern R. Co. v. United States*, 222 U. S. 20, 27, ante, 2, 32 Sup. Ct. Rep. 2, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein.

Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the 5th Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164, and *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it.

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Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employees of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the "due process of law" clause of the 5th Amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the 14th Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579:

(P. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this

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Constitution, and the laws of the United States which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its power, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'

(P. 426) "This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them."

And particular apposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. *Sherlock v. Alling*, 93 P. S. 99, 23 L. ed. 819; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482, 31 L. ed. 508, 510, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Reid v. Colorado*, 187 U. S. 137, 146, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna (Rodd v. Heartt)*, 21 Wall. 558, 581, 22 L. ed. 654, 664; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; *Southern R. Co. v. Reid*, No. 487, 222 U. S. —, ante, 140,

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32 Sup. Ct. Rep. 140; *Northern P. R. Co. v. Washington*, No. 136, 222 U. S. —, ante, 160, 32 Sup. Ct. Rep. 160.

We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the superior courts of the state of Connecticut, and, in that case, the supreme court of errors of the state answered the question in the negative. That, however, was not because the ordinary jurisdiction of the superior courts, as defined by the Constitution and laws of the state, was deemed inadequate or not adapted to the adjudication of such a case, but because the supreme court of errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the superior courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the state respecting the liability of employers to employees for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act, and in others the different standards recognized by the laws of the state.

We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States." 25 Stat. at L. 433, chap. 866, § 1, U. S. Comp. Stat. 1901, p. 508; *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. ed. 542, 546, 4 Sup. Ct. Rep. 544; *United States v. Barnes*, 222 U. S. —, ante, 117, 32 Sup. Ct. Rep. 117. This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that "the jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

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Because of some general observations in the opinion of the supreme court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say "when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion," because we are advised by the decision of the supreme court of errors that the superior courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant.

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in *Claflin v. Houseman*, 93 U. S. 130, 136, 137, 23 L. ed. 833, 838, 839:

"The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two to-

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gether form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of *Albleman v. Booth*, 21 How. 506, 16 L. ed. 169; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

In No. 289, several rulings in the progress of the cause, not covered by what already has been said, are called in question, but it suffices to say of them that they have been carefully considered, and that we find no reversible error in them.

In Nos. 170, 289, and 290 the judgments are affirmed, and in No. 120 the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MCLELLAN *v.* BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, May 24, 1912.)

[98 N. E. Rep. 595.]

Master and Servant—Injuries to Servant—Relationship—Employee of Independent Contractor.*—Where an independent contractor was constructing an abutment for a railroad bridge under the direction of a civil engineer employed by the railroad, an employee of the contractor, who was directed to assist the engineer in marking levels and elevations for the abutment, did not thereby become a servant of the railroad company.

Railroads—Operation—Injuries to Licensees—Actions—Questions of Law or Fact.—Plaintiff, who was assisting in the construction of an abutment for a railroad bridge, was injured by the plank on which he was working being struck by a passing train. He had been working on this plank for considerable time, during which several trains had passed, and there was evidence that the railroad company had furnished a flagman, who had flagged trains and warned men standing on the timbers, in connection with the abutment of the bridge, of approaching trains. Held, that it could not be said, as a matter of law, that plaintiff was negligent in failing to make constant inspection to ascertain that the location of the plank had not changed; and hence that the question of contributory negligence was properly submitted to the jury.

Railroads—Operation—Injuries to Licensees—Actions — Questions of Law or Fact.—It being uncertain what caused the train to strike such plank, and it being inferable that it was the duty of the flagman to warn both those on the abutment and those in charge of the train of danger, whether the failure of the flagman and engineer to see that the plank projected, so as to strike the train, was negligence was a question for the jury.

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Action by Alexander McLellan against the Boston & Maine Railroad. Verdict for plaintiff for \$500, and defendant brings exceptions. Overruled.

William M. Noble and *Herbert R. Morse*, both of Boston, for plaintiff.

Trull & Wier, of Lowell, for defendant.

RUGG, C. J. This is an action of tort at common law. The plaintiff was at work for an independent contractor who was

*See extensive note, 41 R. R. R. 299, 64 Am. & Eng. R. Cas., N. S., 299.

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constructing an abutment for the support of a bridge over the tracks of the defendant. The plaintiff was directed to assist a civil engineer of the defendant in making levels and elevations about this abutment. In order to perform his work he was obliged to get upon some forms in which concrete for the abutment was being put. The plaintiff used a plank to reach his place of work, one end of which rested on the form, and the other at some point away from the tracks. He had stood upon this plank in the performance of his work for a considerable time, during which several trains passed, when a passenger train struck the plank then projecting over the form, causing the plaintiff to fall and be injured. The plank had been in position three or four hours before the accident, during which trains had been passing frequently. There was evidence that the defendant had furnished a flagman, because of the construction of the abutment, who had flagged trains and warned men standing on the timbers in connection with the abutment of the approach of trains, and that his place of duty was near and alongside the abutment.

[1] 1. It could not have been ruled rightly as matter of law that the plaintiff was a servant of the defendant. He had been directed by his master, who was the contractor for the construction of the abutment, to help the engineer of the defendant and do whatever was asked of him. There was a provision in the contract between the defendant and the builder of the abutment that the work should be done under the general direction of the engineer of the defendant. The contractor was obliged to get the elevations and lines from the engineer of the railroad, and the plaintiff was sent in the performance of his employer's duty to do what in this regard he was asked to do by the defendant's engineer. This is different from lending the plaintiff to a third person and placing him absolutely in the control of another. The circumstances of the present case distinguish it from *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328. It is more nearly like *Hooe v. Boston & Northern Street Railway*, 187 Mass. 67, 72 N. E. 341, and *Byrne v. Farnum*, 188 Mass. 219, 74 N. E. 1131.

[2] 2. The plaintiff's due care also appears to have been a question for the jury. Although he knew that the place in which he was at work was one of danger, he also knew that the plank upon which he was standing had for a considerable time before the accident been in such position as not to be within the reach of passing trains. It cannot be pronounced negligence in him as matter of law that he continued to use it without constant inspection of its possible change of location when others were passing near it, and of the character of trains approaching.

[3] 3. The question of the defendant's negligence is a close one, but on the whole we incline to the view that it was for the jury. Although the direct cause of the accident was a

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striking of the plank by a passenger coach upon a moving train, the precise reason why this occurred is not plain. The plank may have projected farther toward the rail, or the passenger coach may have been slightly wider than those on other trains which had passed, or the trucks and body of the car may have been so arranged that the end may have projected farther from the rail as the train passed around the curve of the track at the abutment. Moreover, it might have been inferred that one of the duties of the flagman was to warn those upon the abutment in any danger from passenger trains, as well as to warn those in charge of the train of danger at the abutment. The general situation was one which called for a high degree of care from both engineer and flagman of the defendant in order to avoid the results of a collision. Under these circumstances, failure on their part to perceive a plank projecting so far as to strike a car cannot be said as matter of law to have been lacking in negligence. See *Colford v. New England Structural Co.*, 205 Mass. 283, 91 N. E. 409.

Exceptions overruled.

FRANCHINA *v.* CHICAGO, B. & Q. R. Co.

(Circuit Court of Appeals, Eighth Circuit, March 22, 1912.)

[195 Fed. Rep. 462.]

Trial—Direction of Verdict—Power of Court.—A conflict of a substantial character in the evidence bearing on a material issue necessitates a submission of the issue to the jury.

Master and Servant—Action for Injury to Employee—Working on Track—Questions for Jury.*—Plaintiff's intestate was struck and killed by a train while engaged with a number of others in doing repair work on defendant's railroad track. The men were strung along the track for nearly half a mile, and deceased was the last one reached by the train, and was working alone several hundred feet from the nearest group. The negligence alleged by plaintiff was that no signal was given of the train's approach. Other work-

*See foot-note of *Frank v. Pennsylvania R. Co.* (N. J.), 9 R. R. R. 375, 32 Am. & Eng. R. Cas., N. S., 375, where all the authorities on the subject in this series, preceding it, are collected; foot-note of *Tietz v. Grand Trunk Ry. Co.* (Mich.), 41 R. R. R. 657, 64 Am. & Eng. R. Cas., N. S., 657; *Morgan v. Iowa Cent. Ry. Co.* (Iowa), 41 R. R. R. 404, 64 Am. & Eng. R. Cas., N. S., 404; *Chase v. New York Cent. R. Co.* (Mass.), 41 R. R. R. 382, 64 Am. & Eng. R. Cas., N. S., 382; *Ft. Smith & W. R. Co. v. Messek* (Ark.), 40 R. R. R. 46, 63 Am. & Eng. R. Cas., N. S., 46; first foot-note of *Wilson v. Illinois Cent. R. Co.* (Iowa), 39 R. R. R. 282, 62 Am. & Eng. R. Cas., N. S., 282.

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men who were standing to one side while the train passed testified that they did not hear any signal, and one or more testified positively that the bell was not rung, nor the whistle sounded. This testimony was contradicted by the engineer and fireman. Held, that the witnesses for plaintiff were in such situation that they should have heard the signals if given, and their testimony could not be ignored, and that it created such a substantial conflict in the evidence upon the vital issue in the case that it was error to direct a verdict for defendant.

In error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Francesco Franchina, as administrator of the estate of Antonio Sirignano, deceased, against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

This was a suit instituted by Francesco Franchina, as administrator of the estate of Antonia Sirignano, to recover damages, for and on behalf of the widow and minor children of the deceased, alleged to have been occasioned by the negligence of defendant's servants and agents in the operation of one of its trains. The specific charge of negligence is that while the deceased was engaged in repair work on the track near to the village of Newport, in the state of Minnesota, the defendant propelled a train of cars along its track without giving any warning signal either by bell or whistle, or in any other manner, and thereby negligently caused the same to run over the deceased, and so injure him that he died. The defense consisted of a general denial of the allegations of negligence only.

The case was submitted to the jury on evidence tending to show the following facts: The deceased was one of a gang of 40 or 50 men engaged in repairing the railroad track running along the bluff of the Mississippi river six or seven miles south of St. Paul. The men while at work were strung along the track a distance of one-fourth to one-half of a mile. They generally worked in groups, but, on this particular occasion, the deceased was working by himself, spiking rails to the ties. He was near the southern end of the force, a distance variously stated by the witnesses of from 10 to 20 rails—330 to 660 feet—away from any group of his coemployees. While the men were so disposed along the track, a local passenger train running from St. Paul to La Crosse, propelled at a rate of speed variously estimated from fast to slow, ran over and killed the deceased while he with his back toward the train was in the act of driving home a spike. Witnesses who were standing by the side of the track as the train approached and passed them, north of where the deceased was at work, testified that no bell was rung or whistle sounded as the train advanced towards the

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deceased. One witness who was carrying drinking water for the workmen was on the side of the track very near to the deceased when he was struck. He testified that there was neither a bell rung nor a whistle sounded nor any other warning given of the approach of the train whatsoever. Another witness standing within 150 to 200 feet from the deceased testified that the train approached him quietly, "making no noise at all," and that he heard no whistle sounded or bell rung. Another witness testified that he was working 10 or 12 rails north of where the deceased was working at the time he was struck; that on former occasions the train had usually stopped near to a certain tool box some 40 or 50 rails north of that place; that, on the morning in question, it did not stop there, but went ahead until after it struck the deceased; that he noticed the engineer in charge of the train; that he had his head out of the window where he was sitting, looking back and towards St. Paul; that he heard no whistle sounded or bell rung as the train advanced. He testified that the bell had been usually rung on other mornings, but he emphatically stated that it was not rung that morning and no whistle was sounded. This witness also testified that the boss of the gang had usually warned the workmen of the approach of the train, but that, even if he hallooed on the morning in question, it was an ineffectual warning for all of the men, as they were scattered along the road for a distance of half a mile or so; and two of the witnesses for plaintiff who were nearest to him testified that the boss gave no warning to the deceased of the approach of the train. The testimony of these witnesses was contradicted in many particulars by the engineer, fireman, and yard foreman of the defendant. The first two emphatically denied that there was no blowing of the whistle or ringing of the bell; but asserted that both were sounded as the train approached the deceased.

The Chicago, Milwaukee & St. Paul Railway Company had a track of its road closely parallel to that of the defendant company along the bluff at the place where the deceased met his death, and on that morning a fast mail train running from Chicago to St. Paul met the defendant's train at that place. That train running at full speed scattered dust and gravel among the workmen on the defendant's track, and made much noise and confusion as it approached and passed. This tended to deaden any sound of personal warning or otherwise which might have been given of the approach of the train from St. Paul over the track of the defendant. On this evidence the learned trial court sustained a motion made by defendant and instructed a verdict in its favor, and that action presents the controlling question on this writ of error.

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John W. Willis, for plaintiff in error.

Arthur A. Stewart (*Morton Barrows*, on the brief), for defendant in error.

Before Sanborn and Adams, Circuit Judges, and Wm. H. Munger, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). The rule governing the action of a trial court on a motion for an instructed verdict has been variously stated in the following cases: *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 659, 21 Sup. Ct. 275, 45 L. Ed. 361; *Speer v. Board of County Com'rs*, 32 C. C. A. 101, 88 Fed. 749; *Chicago G. W. Ry. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239, 243.

[1] In any phase of the rule announced in these cases, a conflict of a substantial character in the evidence bearing upon a material issue forbids summary action by the court, and necessitates a submission of the issue to the jury.

[2] The issue of fact tendered by the plaintiff and accepted by the defendant was whether the defendant gave any warning either by bell, whistle, or otherwise of the approach of its train which ran upon and killed the deceased. Whether any such warning was given was therefore a material and decisive question of fact in the case. Three witnesses, who stood close by the track as the train approached and who were apparently in a position to hear any signal if it were given, testified that they heard nothing of the kind; and one testified that his attention was attracted to the engineer, and noticed that he was looking backward in the direction of St. Paul, instead of in front, and that he not only did not hear any such signal, but that none was in fact given. The contention is that the testimony of these witnesses was negative in its character, and of no probative force as against the affirmative testimony of the witnesses for the defendant who testified that the bell was rung and the whistle blown. Attention is called to the cases of *Chicago & N. W. Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65, *Rich v. Chicago, M. & St. P. Ry. Co.*, 78 C. C. A. 663, 149 Fed. 79, and *Chicago, R. I. & P. Ry. v. Stepp*, 90 C. C. A. 431, 164 Fed. 785, 22 L. R. A. (N. S.) 350, and cases there cited, in support of this contention; but we think those cases are inapplicable to the facts of this case. In all of them distinction is carefully drawn between testimony of a witness who was not in a situation to hear the signals if they had been given and one who was in such situation or whose attention was at the time specially directed to the facts and circumstances of the case.

In our last utterance on the subject, found in the *Stepp Case* (*supra*), we said:

"Again; if a witness situated so he could hear the signals, and of such experience that he would have been likely to notice

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them if they had been given, testifies that he did not hear them, the credibility of his evidence is for the jury, unless there is proof that his attention at the time was absorbed in some other matter. Finally, if the attention of a witness is especially directed to the train and its signals, and at the time a distinct impression is made upon his mind that the signals are not given, his testimony is in every particular as trustworthy, though negative, as would be the evidence of another witness similarly situated affirming that the signals were given."

The proof in this case as detailed in the statement tends to show that three men of experience standing in close proximity to the train as it advanced toward deceased, who might have heard any signal if it had been given, and whose attention does not appear to have been absorbed on any other subject, testified that they did not hear the ringing of any bell or the sounding of any whistle or the cautionary warning of any boss or anybody else as the train came along. One of these witnesses had his attention specially called to the action of the engineer of the train, and he testified not only that he did not hear any bell rung or whistle sounded, but that no such signal was in fact given. This evidence was substantial in its character and in sharp conflict with that of defendant on a material issue, and was clearly for the jury to weigh and consider in reaching a verdict in the case.

Some argument was made at the bar in support of the ruling of the trial court that the deceased was guilty of such contributory negligence as defeated plaintiff's action, but that was an affirmative defense, and should have been pleaded if the defendant had deemed it available. It was not only not pleaded but no issue of that kind was tried below, or no instruction asked or given on the subject. Hence we cannot now give it any consideration.

The learned trial judge disposed of the case on the sole ground that there was no substantial evidence of a failure to give the signals referred to. In this we think he erred. The judgment must be reversed, and the cause remanded to the court below, with directions to grant a new trial.

BALTIMORE & O. R. Co. v. WILSON.

(Court of Appeals of Maryland, Jan. 11, 1912.)

[83 Atl. Rep. 248.]

Appeal and Error—Conclusiveness of Verdict—Amount of Recovery.—In a case properly submitted to a jury under suitable instructions, and approved by the trial court, upon motion for a new trial, the verdict is conclusive as to the amount of recovery.

Master and Servant—Duty of Master—Safe Place to Work.*—A master is bound to provide a reasonably safe place for the servant to work in.

Master and Servant—Action for Injuries—Question for Jury—Negligence of Master—Place for Work.—In an action by a watchman employed by a railroad for personal injuries received in the collapse of a bridge, held, on the evidence, that the question of defendant's negligence in failing to provide a reasonably safe place for work was for the jury.

Trial—Instruction—Ignoring Issues and Defenses.—In an action against a railroad company for personal injuries to a watchman, resulting from the collapse of a bridge in the course of construction, a requested instruction, requiring the jury to find, either that the railroad did not use due care in planning the construction of the bridge, or in inspecting the work during its progress, was properly refused, since it ignored the question of its liability, if it did not use due care in selecting the contractor to build the bridge, or it was not constructed in accordance with the plans.

Appeal and Error—Briefs and Argument—Waiver of Exceptions.—An exception to the direction of a verdict, not questioned on appeal, will be regarded as having been waived.

Master and Servant—Master's Liability—Duty of Master.†—A master is not an insurer of the servant's safety.

Master and Servant—Master's Liability—Delegation of Duty—Place for Work.‡—A master's duty in respect to providing the servant a safe place to work cannot be delegated.

Master and Servant—Injury to Servant—Safe Place to Work—Inspection—Delegation of Duty.‡—A railroad employing a contractor

*For the authorities in this series on the subject of the degree of care required of a master in furnishing and maintaining a safe work place, see last paragraph of last foot-note of *Ingram v. Louisiana, etc., R. Co.* (La.), 41 R. R. R. 457, 64 Am. & Eng. R. Cas., N. S., 457; *Henry v. Hudson, etc., R. Co.* (N. Y.), 41 R. R. R. 453, 64 Am. & Eng. R. Cas., N. S., 453; foot-note of *Baltimore, etc., R. Co. v. Taylor* (C. C. A.), 41 R. R. R. 717, 64 Am. & Eng. R. Cas., N. S., 717.

†See last foot-note of *Ingram v. Louisiana, etc., R. Co.* (La.), 41 R. R. R. 457, 64 Am. & Eng. R. Cas., N. S., 457.

‡For the authorities in this series on the question what are the duties of a railroad company which it cannot delegate so as to es-

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in the construction of a bridge cannot escape liability for injuries to a servant, caused by the collapse of the bridge, on the ground that it relied upon a fellow servant to see that the place in which plaintiff was required to work was reasonably safe, since this was a duty owed to plaintiff, for negligence in the performance of which the master was liable.

Master and Servant—Injury to Servant—Action for Injuries—Res Ipsa Loquitur.§—In an action against a railroad by an employee for injuries resulting from the collapse of a bridge in the course of construction, where the evidence showed a construction of false-work for a large and heavy railroad bridge, specially designed to bear great weight and resist the vibration necessarily incident to the passage of trains over it, constructed by the direction of eminent engineers, and in actual use for about two months, suddenly collapsed, and in which defendant offered no adequate explanation for its collapse, the doctrine of *res ipsa loquitur* did not apply, so as to make the falling of the bridge *prima facie* evidence of negligence on the part of the defendant; but plaintiff could not recover without showing that the defendant was guilty of actual negligence.

Appeal from Circuit Court, Queen Anne County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Action by William H. Wilson against the Baltimore & Ohio Railroad Company and another. There was judgment for plaintiff against the defendant named alone, and it appeals. Reversed, and remanded for new trial.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

John E. Semmes, Jr., and John E. Semmes, for appellant.
John S. Young, for appellee.

cape liability for injuries to its employees under the fellow servant doctrine, see last foot-note of *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544, where all those preceding it are collected; first foot-note of *Furlong v. New York, etc., R. Co.* (Conn.), 39 R. R. R. 233, 62 Am. & Eng. R. Cas., N. S., 233; second foot-note of *Hardy v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; last paragraph of last foot-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669.

§See foot-note of *Land v. Southern Ry.* (S. Car.), 9 R. R. R. 155, 32 Am. & Eng. R. Cas., N. S., 155, where all the authorities on the subject in this series, preceding it, are collected; last foot-note of *Boney v. Atlantic C. L. R. Co.* (N. Car.), 42 R. R. R. 36, 65 Am. & Eng. R. Cas., N. S., 36; first foot-note of *Siglin v. Chicago, etc., Ry. Co.* (Iowa), 41 R. R. R. 682, 64 Am. & Eng. R. Cas., N. S., 682; third foot-note of *Fletcher v. Freeman-Smith Lumber Co.* (Ark.), 41 R. R. R. 137, 64 Am. & Eng. R. Cas., N. S., 137; last head-note of *Hope v. Natchez, etc., R. Co.* (Miss.), 40 R. R. R. 314, 63 Am. & Eng. R. Cas., N. S., 314; first foot-note of *Louisville & N. R. Co. v. McMillen* (Ky.), 39 R. R. R. 591, 62 Am. & Eng. R. Cas., N. S., 591.

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STOCKBRIDGE, J. [1] The present case derives its chief importance from the fact that the jury before which it was tried rendered a verdict in favor of the plaintiff for \$20,000, one of the largest verdicts in an action for damages for personal injuries rendered in this state. But with the amount of the verdict this court has nothing to do. That was a question for the jury, if the case made out was one which it was proper to submit to a jury, under suitable instructions, and for the court in which it was tried, upon the motion for a new trial.

The questions of law upon which the case is brought before this court are few in number; but one of them at least is of considerable importance.

[2, 3] The fourth bill of exceptions was taken to the action of the trial court in its rulings upon the defendant's prayers, the first of which was to the effect that there was no legally sufficient evidence to entitle the plaintiff to recover. As this went to the entire case of the plaintiff, a succinct statement of the facts as testified to by the witnesses becomes germane to the consideration. The Baltimore & Ohio Railroad had a single-track bridge over the Susquehanna river, which was being reconstructed and converted into a double-track steel bridge. This involved the taking down of the previously existing structure. For this purpose, and the further purpose of continuing the operations of the railroad, there was erected falsework to support the track while the work was proceeding, and which falsework was designed to bear the weight of the new bridge during the progress of the work, together with the machinery necessarily employed in the construction. The plan was that the bridge, when completed, should rest upon piers built of concrete; the spans between the several piers being of various lengths. The main span between the Cecil county end of the bridge and Watson's Island was to be 377 feet in length. To support the construction of this span and the track of the railroad during the time of construction, two towers were erected. The manner of erecting these towers was: First, double rows of piles were driven in the bed of the river 30 feet apart; each row containing 28 piles. The rows of piles were parallel with the general direction of the river, and at apparently a right angle with the general direction of the bridge and railroad to be constructed above. These piles were then capped with heavy timber, and upon this capping were erected uprights of 12 by 12 timbers, the outer of which, or possibly all, were battered; that is, inclined, so as to resist and distribute the strain from above. The upper ends of these uprights were in turn capped, and the same method of construction continued until the desired height was reached, so that the railroad tracks were elevated about 90 feet above mean tide. In addition to the battering, the uprights were braced by longitudinal and X braces.

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After the construction of these towers, the trains of the defendant company were run upon and over this falsework without accident from about the middle of July, 1908, until the 23d of September. Shortly after 6 o'clock on that morning, a passenger train, west bound, passed over the bridge. This train passed the plaintiff, who was a day watchman on the bridge, employed by the defendant company, not far from the west end of the bridge. The plaintiff, after this train had passed, continued on across the bridge to the east end, and then started to return across the bridge. He had proceeded but a short distance, when he met an east-bound freight. The locomotive and two or three cars of this train passed him, when the structure collapsed, carrying down the falsework and cars, together with the plaintiff, 90 feet. By this fall, the plaintiff was severely injured; and it is to recover for the injuries so sustained that this suit is brought.

The plaintiff called as witnesses Joseph Brandt, who had worked at bridge building for about 10 years, Murray Wood, who had been similarly employed between 5 and 6 years, Christopher Burns, also a bridge worker for 5½ years, George Horner, similarly employed for some time, and Carroll Boyd, also a bridge worker for about 6 years. After testifying to the method of constructing the falsework, they gave evidence which may be epitomized as follows, without quoting the precise questions and answers of each witness: On the afternoon of September 22d, for the purpose of driving a bolt home in the new steelwork, a portion of a rail, weighing in the neighborhood of 1,200 pounds, was used as a rammer. While being so used, the rail or rammer broke, and a piece of it fell, striking and cutting off an end or corner of one of the caps below. This, it was subsequently testified by the witness Reynolds, who was a foreman on that part of the work, and who was called by the defendant, had no effect upon the strength of the tower. But it was further testified to by the witnesses for the plaintiff that the timbers on one of the towers were out of plumb, by some that they had buckled, and that this condition became worse as time progressed, and that it had increased to such a degree that it was the occasion of conversation among the men employed on the work as they were returning home the evening before the accident, and the attention of the foreman, Reynolds, was called to it. Most of the witnesses place the point of what they describe as "buckling" at the cap where the piles and the first set of the 12 by 12 timber uprights came together. That these workmen were correct is corroborated by the witness Reynolds, who testified that the piles did lean out, though he denies that there had been a technical buckle; and he also testifies that they had been in this condition from the time they were first capped, but insists that the safety of the structure was not affected thereby.

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For the purpose of the prayer now being considered, the evidence of the witness of the defendant, Reynolds, is immaterial, and is referred to only to show that the conditions testified to by the plaintiff's witnesses, who were practical men, rather than experts, is amply supported. The rule is too well settled to require any citation of authorities that a master is bound to provide a reasonably safe place for the servant to work in. The plaintiff's evidence tended to show that the place provided was upon a temporary structure of high elevation, required to sustain heavy weights and vibrations, where one of the supports had buckled, or was out of plumb, or had sprung; and that this condition had been increasingly manifest up to the time of the happening of the accident. This evidence, if believed by the jury, would clearly have warranted an inference that the accident was due to the negligence of the defendant in failing to provide a reasonably safe place for the plaintiff to perform his duties; and the refusal of the trial court to grant the first prayer of the defendant was entirely correct.

[4] The defendant's third prayer was likewise properly refused. It required the jury to find, either that the railroad company did not use due care in planning the reconstruction of the bridge, or in inspecting the work during its progress, entirely ignoring the element that the bridge was or should have been constructed in accordance with the plans, or that the railroad company did not use due care in selecting the American Bridge Company to reconstruct the bridge. The railroad company could not in any such manner relieve itself of its legal obligation to provide its own servant, whom it placed on the work, with a reasonably safe place in which to do his work.

Nor is it perceived how the defendant was in any way injured by the granting of its second prayer in connection with the eighth prayer of the plaintiff. This prayer of the plaintiff has been repeatedly passed on and approved by this court; and the effect of the joining to it of the defendant's second prayer was to instruct the jury more precisely as to the burden of proof in respect thereto.

The plaintiff's third prayer was upon the measure of damages, in the event that the jury found a verdict for the plaintiff, and his seventh prayer defined the measure of care or duty owed by the master to the servant, and were both in the form sanctioned by long usage.

[5] The correctness of the granting of the prayer in favor of the American Bridge Company, by which a verdict was directed in favor of that corporation, has not been questioned in this court; and that exception is to be regarded as having been waived.

There remain for consideration plaintiff's prayer, numbered 2½, and defendant's prayer A, both of which raise the same question, namely, whether, in a case like the present, the doctrine of

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res ipsa loquitur is applicable. That it can be invoked on behalf of the plaintiff is the theory of his prayer, and that it cannot be is the theory of the defendant's prayer. In the argument before this court, the appellant sought to justify its position by three propositions: First, that, in the relation of master and servant, the master is never an insurer of the servant's safety, and that he has performed his whole duty when he has exercised reasonable care in providing a safe place for the servant to work in and exercised proper inspection with regard to the place; and, secondly, that if there was negligence in the present case it was the negligence of a fellow servant, for which the master cannot be held to respond in damages; and, thirdly, that the doctrine of *res ipsa loquitur* can never apply in a case arising between master and servant.

[6, 7] In regard to the first of these contentions, it is sufficient to say that, while it is perfectly true that the master is not an insurer of the servant's safety, his duty as regards the servant is nondelegable; and the question whether there was or was not adequate inspection, under the circumstances testified to in this case, was rather a question for the jury than a question of law for the court.

[8] The second proposition of the appellant assumes that there was negligence shown in the case; but claims it to have been the negligence of a fellow servant. But whether the negligence was the original negligence in the construction of the tower by one properly to be classed as a fellow servant, or whether it was the negligence of the defendant in inadequate inspection, was also a question of fact for the jury to determine from the evidence. The rule applicable with regard to the negligence of the fellow servant in a case between master and servant, where there is an intervening contractor, has been so recently fully stated in the able opinion by Judge Thomas, in *Penn Steel Co. v. Nace*, 113 Md. 460, 77 Atl. 1121, that it is not now necessary to repeat it; and it will be sufficient to ascertain whether the court below was correct in instructing the jury, as was done by prayer No. 2½, that "the falling of said bridge, or a part thereof, if the jury find the same, is *prima facie* evidence of negligence on the part of said defendant the said Baltimore & Ohio Railroad Company."

[9] By the plaintiff's prayer No. 8, joined with the defendant's second prayer, the jury were told that the plaintiff was not entitled to recover, unless the jury found that the said company was guilty of negligence, either in the construction, inspection, or maintenance of the falsework, the collapsing of which is claimed to have caused the accident. We thus have the jury told in one instruction that the mere falling of the falsework was *prima facie* evidence of negligence, and in another that the plaintiff's right to recover could not be maintained, unless the jury found the company guilty of negligence. It is, of course, evident that if the

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jury found positive acts of negligence, either in the construction, inspection, or maintenance of the falsework, no harm was done to the defendant by the granting of the plaintiff's prayer No. 2½; while, on the other hand, if the jury found no evidence of negligence, except the accident itself, then serious injury resulted to the defendant from the two instructions.

The evidence in this case shows the construction of falsework for a large and very heavy railroad bridge, specially designed to bear great weight and resist the vibration necessarily incident to the passage of the trains over it, constructed under the direction of eminent engineers and in actual use for about two months, suddenly collapsing, failing to accomplish the very end for which it was planned and built, and for which collapse no adequate explanation has been offered by the defense, though one is suggested in the evidence of the plaintiff, in that the supports of one of the towers were out of plumb, or had sprung or buckled. In the case of *Howser v. C. & P. R. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, what would constitute a proper case for the application of the doctrine of *res ipsa loquitur* was thus stated by Judge Roberts: "Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the proper management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." This was said in a case, not between master and servant, but where some cross-ties fell from a passing train upon the plaintiff, who was not on the right of way of the railroad company, and severely injured him, and in which case no evidence whatever was attempted to be introduced by the defendant to show care, either in the loading of the ties, or inspection of them after being loaded; and among the authorities relied on in that case was *Kearney v. London, Brighton & South Coast R.*, W. L. R. 5 Q. B. 411, which case was decided by a divided court.

In a number of states, and especially in the Western states, there has been a marked disposition to extend the idea that negligence was deducible from the fact of an accident, without any positive evidence of negligence on the part of the defendant. This has been in part due to the adoption of what are known as "workmen's compensation acts;" and in some states, without the intervention of the Legislature, courts have shown an inclination by their decisions to ingraft such a doctrine into their law. That has not, however, been the policy of this state; and decision after decision of this court might be cited to illustrate this fact. It has always been the policy of the courts of Maryland to interpret and administer the law, rather than to make it; and, if a change is to be made in our settled policy, it should be by the law-making

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branch of the state, not by a usurpation by the judicial branch of legislative functions.

Two cases were cited and relied upon by the appellee as tending to support the theory that the mere happening of the accident constituted a *prima facie* case of negligence; yet each of them, when closely examined, disclose acts of negligence testified to, sufficient to have carried those cases to the jury. The class of cases in which the doctrine of *res ipsa loquitur* is applicable is, under our decisions, very much restricted; but it is not meant by this opinion to say that cases may not arise where it can be properly invoked as between master and servant, but a reference to some of our cases will show that this does not come within that class. Thus, in the case of the Winklemann & Brown Drug Co. v. Colladay, 88 Md. 78, 40 Atl. 1078, the doctrine was invoked, and the defendant offered no evidence whatever; but in passing upon that case this court expressly said that, "apart from the presumption of negligence, there was evidence, if the jury believed it, tending to prove negligence on the part of the company."

And in the South Baltimore Car Works v. Schaefer, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560, this court refused the right of the plaintiff to recover, where the sole evidence of negligence was the fact that a sharp knife on a rapidly revolving cylinder broke and flew off, injuring the plaintiff; and in Stewart & Co. v. Harman, 108 Md. 466, 70 Atl. 333, 20 L. R. A. (N. S.) 228, the application of the doctrine was denied, where the sole evidence of negligence was that a large pane of plate glass fell upon and injured the plaintiff; and, also, in Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338, in a very able opinion by the late Chief Justice Alvey, it was said that "the jury should not have been allowed to infer from the simple fact of the happening of the accident that there was negligence or unskillfulness."

In view of these repeated decisions, it appears to this court that there was error, both in granting plaintiff's prayer No. 2½ and in refusing defendant's prayer A, and that the judgment must therefore be reversed; but, inasmuch as there was evidence from which the jury might properly have found negligence in construction, or neglect, or inadequate inspection, the case will be remanded for a new trial.

Judgment reversed, and case remanded for a new trial, with costs to the appellant.

MAUCK v. SOUTHERN RY. CO. IN KENTUCKY.

(Court of Appeals of Kentucky, May 1, 1912.)

[146 S. W. Rep. 28.]

Parent and Child—Loss of Services—Personal Injury—Acquiescence of Parent.—Where a father, with knowledge that his minor son was working for a railway company, made no objection to such employment, though he lived within six miles of the railway and received a portion of his son's wages, there was such acquiescence in the employment as would relieve the company from any liability to him for injuries to the son while employed at hazardous work.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Solomon Mauck against the Southern Railway Company in Kentucky. From a judgment for defendant on a peremptory instruction, plaintiff appeals. Affirmed.

S. M. Sapinsky and *J. R. Duffin*, both of Louisville, for appellant.

Edward P. Humphrey, of Louisville, for appellee.

CLAY, C. Owen Mauck, an infant 17 years of age, was struck by a hand car and injured while employed by the Southern Railway Company in Kentucky. His father, Solomon Mauck, brought this action against the company to recover damages for loss of his son's services. He bases his action on the fact that the company, without his consent, hired his son, an infant, and put him to work at a dangerous employment, and that he was injured while so employed. The company not only denied the allegations of the petition, but pleaded that the son had been emancipated. At the conclusion of plaintiff's evidence, the court directed a verdict in favor of the defendant. To review the propriety of this ruling, this appeal is prosecuted.

The evidence shows that appellant is a magistrate, residing at Doolittle Mills, Perry county, Ind., but a short distance from Louisville, and near the line of the railway company. According to his evidence, Al Bovinett came to him on June 16, 1910, for the purpose of getting Owen to work on the Southern Railroad at Louisville. He told Bovinett that Owen could not go. After some insistence on the part of Bovinett, he told Bovinett he would let him know Saturday. He says that he went away from home on Saturday, but left word with his wife to tell Bovinett that his son could not go. That was on June 18, 1910. After that he did not see Owen any more until he was sent home on crutches. He heard Owen was in Louisville, but had no means

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to go up there, or he would have come and seen about it. On cross-examination, he admits that when he returned home they told him that Bovinett had taken Owen off, and he supposed that they had gone off to work on a section. Owen afterwards returned home and had some washing done. Appellant, however, was absent at the time. Owen came for the purpose of getting others to work for the railroad. Appellant, when he came home, was informed of this fact. It was partly his understanding that his son had gone to Louisville to work for the railroad, and he supposed that he did not work for nothing. He tried to get word to his son, but could not find anybody who could tell him about him, although the railroad passed within about six miles of his house. Appellant admitted that his son had worked for the Southern Railroad in East St. Louis, and he knew of this fact. When at home, he gave his son his board. His son went away and worked for wages, and after paying his expenses, would send the balance home.

Mrs. Mauck testifies that her husband left word with her to tell Bovinett that Owen could not go with him. This message was communicated to Bovinett. Notwithstanding the message, they both left. Appellant was absent at the time. She knew where the boy went. She knew that he was in Louisville working on a railroad section. Did not think her husband knew it all the time. Her husband knew where Owen was in a general way. After he went off with Bovinett, he knew Owen went to work on a railroad. Nothing was done about getting him back. Owen had worked away from home several times before, and after taking what he needed for clothes and board, he would bring his wages home. When Owen returned home the first time after going to Louisville, he told her where he was working. Owen stayed at home a couple of days, but his father was absent. When his father returned, he heard about it, and said he wished he had been there. When Owen returned on crutches, he brought his money with him, and gave every cent to the family, and it was used by them for their benefit. She guessed that appellant knew this fact. Owen Mauck, who was injured, testifies that Al Bovinett came down on the 16th of June to get him to go to work for the Southern Railroad. Bovinett asked his father if he could go, and his father told him he could not. On the 18th his mother told him that his father, who was absent, had left word for him not to go. Bovinett kept on begging, so he decided to go. Al Bovinett and his brother, Charlie, both of whom were working for the railroad, had lived in the vicinity of witness all their lives. After stating on cross-examination that his people did not know that he was in Louisville, he admits that his mother knew that he was going to work for the railroad. While he claims that his father did not know that he was working in Louisville, he admits that his father knew that he was

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working for the Southern Railway in the neighborhood of Louisville.

For appellant, it is contended that there is not the slightest proof tending to show consent on the part of appellant to his son's employment. While appellant does testify that he did not give his consent, and that he had no knowledge of the fact that his son was working for the railroad company, all the circumstances in the case show the contrary. He knew that Bovinett had come to get his son to work for the railroad. He knew that his son had left with Bovinett for the purpose of working for the railroad. He knew when his son returned home to have his clothes washed, and that he left home to return to his work. His wife says that he knew this fact; his son says that he knew this fact; and, while he himself claims not to have known it, he admits that it was partly his understanding. It was about eight weeks from the time when his son first left home to go to work for the railroad until he was injured. During this time, although the railroad ran within a short distance from his house, and he was only a few miles distant from the city of Louisville, he never once made any protest or objection to his son's continuing in the service of the railroad. Although claiming that his son was working without his consent, and that he did not authorize the original employment, his knowledge that his son was so employed, and his failure at any time thereafter to indicate, by word or act, that he objected to the employment, are sufficient to constitute consent. Furthermore, it is shown that Owen had frequently worked away from home, and after using enough money to support himself, brought the remainder of his wages to his family. In this case he did the same thing, and the money was used by the family. We do not see, under the facts of this case, how it can be distinguished from the case of *L. & N. R. R. Co. v. Davis*, 105 S. W. 455, 32 Ky. Law Rep. 306. There the father knew that his son was away working for the railroad company, and he made no protest or objection. It is true that the son was working only two miles and a half away, and that the railroad was nearer to the father's home. That fact cannot alter the rule where the railroad is within a reasonable distance, and a protest or objection could be easily made. After referring to the fact that the father lived within two miles and a half of where his son was working for the railroad, and had made no protest or objection to his remaining at work, the court, in *L. & N. R. R. Co. v. Davis*, *supra*, said: "We think this was a consent on the part of the father to the employment of his son by the appellant. He had no right, if he objected to the employment, to remain silent about it until his son was hurt, and then complain that the employment was without his consent. He allowed the boy to draw his own wages, and it does not alter the case that the money was delivered to the father. If the father

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allowed the boy to keep the money, this was a practical manumission of him, and if he required him to bring it home, this was a ratification of the employment. The defendant was clearly entitled to a peremptory instruction to the jury to find for it at the close of plaintiff's evidence; but, as this was not asked for, it cannot be heard to complain that the court did not give it.

* * * We have already shown that the plaintiff, by his own testimony, established that he acquiesced in his son's continuing in the employment of the corporation after he knew of it, and this is all that was required to relieve it of liability in a case like this for employing an infant in a hazardous business."

For the same reason, we conclude that appellant is not entitled to recover in this action, and that the peremptory instruction was properly given.

Judgment affirmed.

STATE *ex rel.* GREAT NORTHERN RY. CO. *v.* SUPERIOR COURT OF SNOHOMISH COUNTY *et al.*

(Supreme Court of Washington, May 31, 1912.)

[123 Pac. Rep. 996.]

Statutes—Title—Sufficiency.—Rem. & Bal. Code, § 8738, which authorizes a railway or canal corporation to change the grade or location of its road or canal and to appropriate necessary lands, etc., therefor, is sufficiently covered by the title, "An act to provide for the formation of corporations," within Territorial Rev. St. U. S. § 1924, which required every law to embrace one subject, to be expressed in the title.

Eminent Domain—Public Use—Railroads.*—Condemnation of land by a railroad company under Rem. & Bal. Code, § 8738, to use earth therefrom in raising the grade of the company's road, involves public use.

Department 2. Writ of review by the State of Washington, on relation of the Great Northern Railway Company, against

*For the authorities in this series on the question what does, and does not, constitute a public use for which private property may be condemned, see foot-note of *Chesapeake Stone Co. v. Moreland* (Ky.), 29 R. R. R. 424, 52 Am. & Eng. R. Cas., N. S., 424, where all those preceding it are collected or referred to; foot-note of *Neitzel v. Spokane International Ry. Co.* (Wash.), 42 R. R. R. 722, 65 Am. & Eng. R. Cas., N. S., 722; last foot-note of *State v. Chicago, etc., Ry. Co.* (Minn.), 42 R. R. R. 198, 65 Am. & Eng. R. Cas., N. S., 198; last head-note of *Clark v. Superior Court* (Wash.), 41 R. R. R. 45, 64 Am. & Eng. R. Cas., N. S., 45; *Bedford Quarries Co. v. Chicago, etc., Ry. Co.* (Ind.), 41 R. R. R. 24, 64 Am. & Eng. R. Cas., N. S., 24; *Chicago, etc., Ry. Co. v. Baugh* (Ind.), 40 R. R. R. 407, 63 Am. & Eng. R. Cas., N. S., 407; *Westport Stone Co. v. Thomas* (Ind.), 40 R. R. R. 376, 63 Am. & Eng. R. Cas., N. S., 376.

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the Superior Court for Snohomish County and others, to review judgment dismissing the railway company's petition in a condemnation proceeding against Christian Joergenson and another. Order reversed, and cause reinstated.

F. V. Brown and *F. G. Dorety*, both of Seattle, for plaintiff.

Arctander, Halls & Jacobsen, of Seattle, for respondents.

MOUNT, J. The relater brought an action in the court below to condemn a certain tract of land belonging to the respondents Christian Joergenson and wife. The railway company seeks the land for the purpose of removing the earth therefrom, in order to fill and raise the grade of its railway between the stations of Silvana and Burlington, a distance of about 22 miles. The tract of land sought lies between these stations, and adjoins the right of way of the railway company. The object for which the land is sought is stated in the petition as follows: "The obtaining of materials for construction and maintenance of the railroad of your petitioner as hereinafter described, and for the security and safety of the public in the construction, maintenance, and operation of said railway. That your petitioner owns and is now operating a line of railroad from the city of Vancouver in the province of British Columbia, Dominion of Canada, to the city of Seattle, in the state of Washington, and through the state of Washington to the cities of St. Paul and Duluth in the state of Minnesota, and that it operates trains over said railway and other tracks to the city of Portland in the state of Oregon. That the said railway of petitioner serves the towns of Burlington in the county of Skagit and Stanwood and Silvana in the county of Snohomish, which towns have stations situated upon the main line of your petitioner between Vancouver, British Columbia, and all other points mentioned herein, and that the property herein sought to be appropriated immediately adjoins the right of way of said railway. That for several years last past, and particularly in November, 1909, and November, 1911, the said railway of your petitioner, between said towns of Silvana and Burlington, for a distance of approximately six miles to the south of the property herein sought to be condemned, and for approximately sixteen miles to the north of said property, has been damaged and washed away by floods which have delayed traffic upon said railroads and interfered with the security and safety of the public, and that it is necessary for your petitioner to raise the embankment upon which its railroad is constructed between said towns of Silvana and Burlington and to secure additional earth to construct said embankment. That your petitioner owns no land or earth from which materials for constructing or raising said embankment can be conveniently and economically removed and used by your petitioner for the

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purposes above mentioned, and that the object for which the said lands, real estate, and premises are sought to be appropriated, condemned, and acquired by your petitioner is the obtaining of materials therefrom for the purposes aforesaid. That said object and use is a public object and use, and the public interest requires the prosecution of the aforesaid enterprise of your petitioner, and that said lands, real estate, premises, and property sought to be appropriated herein are required and necessary for the purposes of such enterprise." The respondents filed a denial of the allegations of necessity, and also a motion to dismiss the action upon the ground that the petition did not state facts sufficient to authorize a condemnation of the property sought. The lower court sustained this motion, and dismissed the petition, whereupon the relator sued out this writ of review. No question is made here as to the method of review, and we shall therefore assume, without deciding, that this is a proper method, and proceed to the merits of the case.

[1] It is contended by the relator that the land sought is a proper subject of condemnation for the use stated, under the provisions of section 8738, Rem. & Bal. Code, and also under the provisions of section 8740. The respondents concede that section 8738 gives authority to the relator to condemn the land for the purpose described, but contend that this section is void because it was enacted in a law the title of which was insufficient. The statute is as follows: "Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation, for the purpose of avoiding annoyances to public travel, or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change shall have the same right to enter upon, examine, survey, and appropriate the necessary lands and materials as in the original location and construction of such road or canal." This statute was first enacted by the territorial Legislature in 1869 as section 3 of chapter 3 of an act entitled "An act to provide for the formation of corporations." The section was re-enacted under the same title in 1873, and again in 1881. The organic act of the territory provided that "every law shall embrace but one object and that shall be expressed in the title." Section 1924, Rev. Stats. U. S. It is argued that the title of this act is insufficient to authorize the section quoted, and for that reason the section is void. Many cases decided by this court are cited to sustain this contention, among them being *Harland v. Territory*, 3 Wash. T. 131, 13 Pac. 453; *Percival v. Cowychee, etc., Dist.*, 15 Wash. 480, 46 Pac. 1035; *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106; *State v. Clark*, 43 Wash. 664, 86 Pac. 1067, and other cases. But we think none of these cases

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are controlling upon the question here presented. This provision of the organic act above referred to was not intended to require details and particulars to be stated in the title of acts. We have many times held that this provision and the same provision from our Constitution do not require the title of an act to furnish an index of the whole act. *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728. "A statute in the nature of an enabling act, which embodies a general scheme of incorporation, may embrace the greatest variety of subjects germane to corporations, under a title couched in the most general form of words, such as an act concerning private corporations. In treating of railroad corporations, it may confer upon them the power to condemn land for right of way and to receive subscriptions of municipalities to their stock, and all this without coming within such a constitutional inhibition. The act 'to revise the laws providing for the incorporation of railroad companies' does not violate such a constitutional provision, by including the substantial provisions of a former law which imposes a liability upon railroad companies for injuries resulting from negligence to fence their tracks. 'An act to authorize the organization of annuity, safe deposit, and trust companies' may properly embrace a provision granting to such corporations the power to act as guardians of the estates of insane persons." 10 Cyc. p. 188, par. "g." So in this case, under a title, "An act to provide for the formation of corporations," we would expect to find the powers and duties of the corporations defined, and among these powers the right of eminent domain would naturally be included because such right is germane to the creation or formation of corporations. The statute is therefore not void on account of the title.

[2] It is argued with much force by counsel for respondents that the use of respondents' property sought in this case is a private and not a public use. The case of *In re Rhode Island Suburban Ry. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879, is relied upon to sustain this position, and is quoted at length in the briefs. It is there stated: "* * * The true test of such use is whether the taking is essential to the service of the public franchise, or whether it pertains to the private interests of the company in the details of its business. The former constitutes a public use and the latter does not." The petition in this case alleges, in substance, that the railway, for a distance of approximately 22 miles, has been damaged and washed away by floods, which have delayed traffic upon said railway and interfered with the security and safety of the public; that it is necessary to raise the embankments upon which the railroad is constructed; that the public interest and safety require the prosecution of said enterprise; and that this land is necessary therefor. These allegations must be taken as true in this case, and, being so, it seems to follow that the use of the soil sought

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is essential to the service and use of the public franchise in order to provide for the safety of the public, and is not to provide for the private interests of the company. *State ex rel. Harlan v. Centralia, etc., Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198.

For these reasons we are of the opinion that the court erred in dismissing the petition. The judgment is therefore reversed, and the cause is reinstated for further proceedings.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

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(Supreme Judicial Court of Maine, May 9, 1912.)

[83 Atl. Rep. 121.]

Street Railroads—Injury to Pedestrian—Negligence of Motorman.—In an action against a street railway company for death of plaintiff's child by being struck by a street car, evidence held to show that the motorman failed to exercise that degree of care which the situation demanded, especially in failing to reduce the speed of the car and having it under control as demanded by the exigencies of the occasion.

Parent and Child—Injury to Child—Contributory Negligence of Mother.*—Where a mother was obliged to go to a nearby market for something for supper and left her five year old child with a nine year old daughter on the sidewalk, telling the latter to watch the child, which she promised to do, and the young child was struck by a street car during her absence, the mother was not guilty of contributory negligence.

Negligence—Contributory Negligence—Capacity of Child—Question for Jury.—Though the court can say, as a matter of law, that there is an age at which a child cannot exercise any care under the circumstances, and also an age when the court can say, as a matter of law, that a child is capable of exercising some care under the

*For the authorities in this series on the question what is, and is not, contributory negligence on the part of parents, in actions by them for injuries to their children, see last foot-note of *St. Louis, etc., Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807, where all those preceding it are collected; second foot-note of *Tecker v. Seattle, etc., Ry. Co.* (Wash.), 38 R. R. R. 229, 61 Am. & Eng. R. Cas., N. S., 229.

For the authorities in this series on the subject of the negligence of parents in caring for the safety of their children as affected by their poverty, see foot-note of *Cornovski v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 37, 50 Am. & Eng. R. Cas., N. S., 37, where all those preceding it are collected or referred to.

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circumstances, between these limits are the ages where it is for the jury to determine the capacity of the child to exercise care for itself.

Street Railroads—Injury to Child on Track—Care of Child.—In an action for the death of a child about five years old struck by a street car, evidence held not to show want of due care on the part of the child.

On Motion from Supreme Judicial Court, Penobscot County.

Action by Elizabeth Grant, administratrix, against the Bangor Railway & Electric Company, to recover damages at common law for personal injuries sustained by her intestate, who was her child five years and three months old, by reason of being struck and run over by a street car of the defendant and which resulted in the death of the child a few hours after the injury. The declaration in the writ alleges that the deceased child "endured great conscious mental and physical suffering from the effects of her said injuries for a long period of time, to wit, from the time of receiving her said injuries until the time of her death," and the evidence shows that the child was conscious after her injuries and underwent great suffering. Verdict for plaintiff for \$1,508. The defendant filed a general motion for a new trial. Overruled.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Fellows & Fellows, of Bangor, for plaintiff.

E. C. Ryder, of Bangor, for defendant.

CORNISH, J. This is an action on the case brought by the plaintiff, as administratrix of the estate of Ida Bernice Grant, her deceased child five years and three months old, to recover damages at common law for injuries sustained by her intestate by reason of being struck and run over by a car of the defendant on Harlow street in the city of Bangor, about 5:30 p. m. July 13, 1910, from which injuries the child died a few hours later. The case is before the law court on defendant's motion to set aside the verdict as against the evidence.

The following facts are fairly established:

Mrs. Grant lived on the second floor of the National block on the corner of Harlow and Franklin streets. Harlow street runs in a general northerly and southerly direction, and the car in question was on its regular route, having come into Harlow street from Cumberland street at a point 482 feet north of the place of the accident, and was passing southerly along the center of Harlow street toward Center street. Harlow street is one of the busy streets of the city, and the surroundings are such that motormen have special instructions not to run too fast on that street. The accident occurred about five feet below the Prospect

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street crossing, and in front of the playground in the yard of the high school. At this point the city was excavating a reservoir, so that the entire sidewalk and a portion of the street itself was blocked by the excavated earth, leaving a space of only two or three feet between the outside of this pile of earth and the track of the defendant. This narrow space was the walk in use. Cumberland street makes a sharp descent into Harlow street, and from the junction there is a continuous downgrade of $2\frac{1}{2}$ per cent. on Harlow street past the place of accident toward Center street. The motorman had been in the employ of the defendant since May 30, 1910, was a spare hand, and had been on this run three days.

Mrs. Grant, the mother, was obliged to go to a nearby market to purchase something for supper and left her five year old child for a few minutes on the sidewalk with the injunction to stay there, which the child promised to do. At the same time she called her older daughter, a girl of nine, and told her to watch her sister, which she also promised to do. The mother was gone only about 10 minutes, but the accident happened before her return.

It appears that the child did not remain where she was left, but walked along the sidewalk to the excavation and was seen standing by the reservoir about five or six feet from the track and eight feet from the crosswalk on Prospect street. She was looking into the reservoir with her back toward the approaching car. Then, in the language of an eyewitness called by the defendant: "She started across the track slowly until she was about in the middle of the track, when she turned slightly, and she saw the car, and she didn't know whether to continue and go across or come back. She seemed kind of dazed, and the car struck her on the forehead and knocked her down and run over her."

It further appears from the motorman's own testimony: That, as soon as he turned into Harlow street from Cumberland street, he saw the child standing near the track by the reservoir, and he watched her as she stood there all the time he was coming down the street, his vision being unobstructed. That he was coasting along Harlow street with the power shut off; that the car was moving in his judgment about 7 or 8 miles an hour. That he did not apply the brakes until he saw the child start to cross the street. That he was then about a car length or 30 feet distant. That he immediately put on the brake and reversed the power, but it was too late. The car struck the little girl where she was in the center of the track and ran over her. Reversing the power caused a fuse to blow out, which locked the wheels, and the car slid a distance of $2\frac{1}{2}$ car's length, or 75 feet, before it stopped. That the rail was wet and muddy owing to the work that was going on.

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Witnesses for the plaintiff made the speed much greater than 7 or 8 miles an hour, some calling it 15 or 20, and others simply stating that the car was going very fast, so fast as it came out of Cumberland street and continued its course down Harlow street as to attract their attention. The distance which the car went after the accident would seem to confirm this view; the motorman making it 75 feet, other witnesses more than 100.

Such is the picture, and as is usual in this class of cases, where it is fairly drawn, the legal conclusions that follow are quite apparent.

[1] 1. Defendant's negligence:

From the above statement of facts it is difficult to resist the conclusion that the motorman failed to exercise that degree of prudent and watchful care which the situation demanded, especially in using that degree of precaution in reducing the speed of the car and having it under his immediate control which the exigencies required.

The speed at which a car may be properly run and the kind of control which should be exercised over it must depend to some extent upon the surrounding circumstances and the situation ahead. No specific rate can be arbitrarily fixed. A speed of 13 miles an hour on Upper Main street in Lewiston under the there existing conditions was not considered necessarily dangerous and reckless in *Malia v. St. Ry. Co.*, 107 Me. 95, 77 Atl. 541, while a much less rate was demanded where the track was near the sidewalk and private driveways were in frequent use in *Butler v. Railway Co.*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267, or in approaching public street junctions, as in *Denis v. Railway Co.*, 104 Me. 39, 70 Atl. 1047. A similar degree of caution should be observed in passing public playgrounds or where children are in the street. "The driver of a horse car in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected, and among these may be reckoned the risks arising from the heedlessness and indiscretion of children in the street." *Collins v. So. Boston R. R.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675.

The motorman, in the case at bar, admits that he saw this little girl as she was standing only 5 or 6 feet from the track when he was nearly 500 feet away. She stood there facing away from the car and apparently unaware of its approach. With the indiscretion of childhood, she might be expected to step across the track; at least, it might not be unexpected. Yet, with this combination facing him, a street crossing, a nearby playground, an obstruction on one side of the street, and a little child perilously near the track and apparently oblivious of the approaching car, the motorman maintained his speed up to such a rate and to within such close proximity that when the child

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turned and attempted to walk across the tracks he could not sufficiently control the car to avoid collision. His efforts then were too late. And yet, it was not the unexpected, but what might reasonably be expected, which happened, and the reasonably prudent motorman would have foreseen it and guarded against it, either by stopping the car completely or by having it under such control that he could stop it almost instantaneously. This man did neither.

Nor does the alleged wet and slippery condition of the rails afford sufficient excuse. If that condition existed, it was known to no one better than to the man who had been running on this same circuit during the past three days while work upon the reservoir had been in progress, and therefore greater care was imposed upon him to counteract that condition by extra precautions, and by running his car at a lower speed and under better control than usual.

Upon the question of defendant's negligence, we think the verdict of the jury cannot be said to be manifestly wrong.

[2, 3] 2. Contributory negligence on the part of the mother:

The second point raised in defense is that no recovery can be had because the child was negligently permitted by her mother to be upon the street unattended at the time of the accident. The standard of age at which a child is chargeable with parental negligence cannot be absolutely fixed, although within certain limits it may be approximately determined. "There doubtless is an age where the court can say as a matter of law that a child cannot exercise any care under any circumstances. There is also an age where the court can say as matter of law that a minor is capable of exercising some care under circumstances like those in question. * * * The limits of these two classes are not settled by our decisions." *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 43, 78 N. E. 382, 383.

The test, of course, is the capacity of the child to exercise care for itself. In the application of this test it has been held that a child of 19 months was of such tender age as to be incapable of exercising such care as a matter of law (*Gibbons v. Williams*, 135 Mass. 333); so a child of 20 months (*Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449); of 2 years (*Wright v. Railroad Co.*, 4 Allen [Mass.] 283); of 2 years and 4 months (*Callahan v. Bean*, 9 Allen [Mass.] 401); of 3 years and 10 months (*Cotter v. Railroad Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267).

On the other hand, such capacity has been held to be possessed by a child of 9 years (*Brown v. Railway Co.*, 58 Me. 384); of 10 (*Colomb v. Railway Co.*, 100 Me. 418, 61 Atl. 898); and of 12 (*Gleason v. Smith*, 180 Mass. 6, 61 N. E. 220, 55 L. R. A. 622, 91 Am. St. Rep. 261). Between these two extremes lies a zone with shadowy and indefinite boundaries.

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But, however young the child may be, the negligence imputable to the parent or custodian from the mere presence of the unattended child in the place of danger is only *prima facie* and not conclusive. *Gibbons v. Williams*, *Grant v. Fitchburg*, *Wright v. Railroad Co.*, *Callahan v. Bean*, *supra*, and *O'Brien v. McGlinchy*, 68 Me. 552.

The facts and circumstances in explanation of the child's presence are always to be considered. No hard and fast rules as to the care of children can be laid down, and the financial condition of the family and the other cares devolving upon the parents are not to be ignored.

As is said in *Thompson on Neg.* vol. 1, p. 306, in discussing this question: "Small children have a right to light, air, and exercise, and the children of the poor cannot be constantly watched by their parents."

In the case at bar, the family, which was apparently in limited circumstances, consisted of the mother and two girls, aged five and nine, and they occupied a second story tenement. The mother had been calling upon a friend the afternoon of the accident, having the younger child with her and leaving the older at home. Just as she reached home, she found that she was obliged to go to a market a short distance off in order to obtain something for supper. Instead of taking the little child with her again, she left her in the care of the nine year old sister with strict instructions as to watchfulness. She expected to be and was gone less than 10 minutes. To hold that, under these circumstances, the mother did not use that degree of care which an ordinarily prudent woman in her station in life and under the same circumstances would exercise is too severe, and such has been the tendency of the decisions, where the question has been held to be for the jury and a verdict in favor of the plaintiff has been allowed to stand.

To illustrate:

A mother allowing a child 2 years and 10 months old to go with her sister, a child of 5 years and 4 months, to play in a vacant lot at the side of the house, and the lot being unfenced and unguarded and fronting on a public street. *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257.

The mother of a child 3 years old, having hung out the clothes in the yard, while the child was playing therein, went into the house to set the table for dinner and left the child playing alone inside an open gateway leading into the street. *Creed v. Kendall*, 156 Mass. 291, 31 N. E. 6.

A boy between 4½ and 5 years old was permitted, by a sick mother, who had two younger children, to play about the room, but while she was asleep he escaped from the house, first to a neighbor's, and then to the street. *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653. A boy of 4 was per-

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mitted to walk in the streets of a city under the care of his sister, who was nearly 11. *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675. Of like effect are *Hewitt v. Taunton Street Ry. Co.*, 167 Mass. 483, 46 N. E. 106; *Ingraham v. Street Ry.*, 207 Mass. 451, 93 N. E. 692.

We have not overlooked a line of decisions, many of which are cited by the learned counsel for the defendant, in which the court held that the parent or custodian did not exercise reasonable precaution in the care of the child. Such are *Callahan v. Bean*, 9 Allen (Mass.), 401; *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 9 L. R. A. 259, 23 Am. St. Rep. 842; *Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; *Cotter v. R. R. Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267. But a careful study of the facts in these cases differentiates them from the cases before cited. It is simply a question as to whether the facts of a particular case place it below or above the required standard. The Massachusetts court recognizes the distinction which is one of fact and makes each case as it is brought up fall into one class or the other as the facts may dictate. Applying the same rule here, we have no hesitancy in saying that the case at bar belongs to the class where the jury were justified in finding that the mother exercised reasonable care.

[4] 3. Want of due care on the part of the child:

This question arises only on the assumption that the intestate was of sufficient age and intelligence to be permitted to go alone upon the street on which electric cars were frequently running. If she had not attained that age and intelligence and there was no want of due care on the part of the mother, then this point is not involved.

Here, again, there is a zone between two limits which cannot be exactly fixed. *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 78 N. E. 382, *supra*.

If the jury found in the case at bar that the intestate was capable of exercising care, then they must have found that she used that degree of care which the ordinarily prudent child of her age would have exercised under the same circumstances, and that finding we are not disposed to disturb.

It appears that she was standing near the track looking into the excavation, that others were about, that she was facing away from the car, and apparently unaware of its approach. There may have been a reason for this. Perhaps the gong was not sounded. The motorman testified that he used it, but many of the witnesses both on and off the car, and including some for the defendant as well as the plaintiff, did not hear it. Probably she did not. Under these conditions, she walked towards and over the track. She did not dart across quickly, as if to dodge

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ahead of the car, but walked slowly with her head down. The only want of care which could be attributable to her would be her failure to look up the line to see if a car were coming. That is all that could be expected of an adult, and the law is not so unreasonable as to require so high a degree of watchfulness on the part of a child of five as of a mature man. The measure of care required was that degree or extent which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. That measure the jury have found she fulfilled.

The cases cited by the defendant are clearly distinguishable because of their peculiar facts. In some the child was more mature, as a child of 8 years, in *Morey v. St. Ry.*, 171 Mass. 164, 50 N. E. 530; of 9 in *Young v. Small*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457; and of 10, in *Colomb v. St. Ry.*, 100 Me. 418, 61 Atl. 898; while in *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282, and *Murphy v. Boston Elevated*, 188 Mass. 8, 73 N. E. 1018, the children, though only between 5 and 6 years of age, were on the street by the permission of the parents and so conducted themselves as to be considered reckless even for that age in attempting to run across the street and to dodge a closely approaching car in one case and a team in the other. The case at bar more nearly resembles *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188, and *Sullivan v. Railway Co.*, 192 Mass. 37, 78 N. E. 382, *supra*.

It is the opinion of the court that the jury were warranted in their findings upon all branches of the case, and the entry must therefore be:

Motion overruled.

HARRIS v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1912.)

[98 N. E. Rep. 578.]

Railroads—Operation—Accidents at Crossings—Defects in Tracks.*
—Where a railroad company's tracks were lawfully across a street, they did not, when properly constructed and maintained, constitute a defect for which it was liable, even though they were obstacles to travel.

Railroads—Operation—Accidents at Crossings—Defects—Question for Jury.—In an action by one injured while crossing a railroad track, the question whether there was a defect in the way held sufficient to go to the jury.

Railroads—Operation—Accidents at Crossings—Defects. — While Rev. Laws, c. 111, § 129, requires a railroad company to maintain that portion of a street which is crossed by its tracks at grade, it is not obliged to keep the way in repair except for the purpose of travel, and one using the way merely as a playground is not entitled to recover for injury caused by defects therein.

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by T. L. Harris, by his next friend, against the Boston & Maine Railroad. There was a verdict for defendant, and plaintiff excepted. Exceptions overruled.

Hamilton & Eaton, of Boston, for plaintiff.

A. R. Tisdale, of Boston, for defendant.

DE COURCY, J. [1] By statute there was imposed upon the defendant the duty of keeping in repair that portion of Railroad street which was crossed by the railroad at grade. R. L. c. 111, § 129; *Scanlan v. Boston*, 140 Mass. 84, 2 N. E. 787; *Mack v. Boston & Albany Railroad*, 164 Mass. 393, 41 N. E. 653.

[2] It being agreed that the defendant was operating a railroad across the street lawfully, its tracks, when properly constructed and maintained, cannot be a defect for which it is liable, even though they may be obstacles to travel. *Lawrence v. New Bedford*, 160 Mass. 227, 35 N. E. 459; *Fowler v. Gardner*, 169 Mass. 505, 48 N. E. 619. There was evidence that at the place of the

*For the authorities in this series on the subject of the duties and liabilities of street railways with respect to keeping the streets occupied by their tracks in safe condition for other users of streets, see foot-note of *Pugh v. Texarkana, etc., Co.* (Ark.), 29 R. R. R. 755, 52 Am. & Eng. R. Cas., N. S., 755, where all those preceding it are collected; last foot-note of *White v. Lewiston, etc., Ry.* (Me.), 39 R. R. R. 364, 62 Am. & Eng. R. Cas., N. S., 364.

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accident the space between the rail and the planking was from two and a half to three inches, and that there was "a sort of cutting along the edge of the planking, a kind of slivering, as if the flange of a wheel might have slipped along and worn the planking off." This evidence, although slight made it a question of fact for the jury to decide whether there was a defect in the way. *Gillett v. Western Railroad*, 8 Allen, 560.

[3] The defendant, however, was not obliged to keep this portion of the way in repair, except for the purposes of travel; and the plaintiff was not a traveler within the established meaning of that word in the statute, creating liability for defects in highways. He was using the way simply as a playground and was racing in competition with his companions when his foot was caught between the rail and the planking. However we might decide if the question were an open one, the case is governed by *Blodgett v. Boston*, 8 Allen, 237, and *Tighe v. Lowell*, 119 Mass. 472; and the court rightly directed a verdict for the defendant.

Exceptions overruled.

SOUTHERN RY. CO. v. SMITH.

(Supreme Court of Alabama, April 9, 1912. Rehearing Denied May 1, 1912.)

[58 So. Rep. 429.]

Railroads—Injuries to Trespasser—Duty to Avoid Injury.*—A railroad owes a child trespassing on its tracks no duty, save to avoid injuring him after discovering his peril.

Railroads—Action for Injuries—Question for Jury—Avoidable Injury.—On evidence in an action for the death of plaintiff's child,

*For the authorities in this series on the question whether it is the duty of railroad employees to look out for children trespassing on or about cars or railroad tracks, see foot-note of *Wagner v. Chicago & N. W. Ry. Co.* (Iowa), 11 R. R. R. 789, 34 Am. & Eng. R. Cas., N. S., 789, where all those preceding it are collected; foot-note of *Berg v. Duluth, etc., Ry. Co.* (Minn.), 37 R. R. R. 392, 60 Am. & Eng. R. Cas., N. S., 392; second foot-note of *Southern Ry. Co. v. Smith* (Ala.), 33 R. R. R. 446, 56 Am. & Eng. R. Cas., N. S., 446.

For the authorities in this series on the subject of the right of trainmen to presume that children seen on or near track will avoid being struck by trains, see first foot-note of *Southern Ry. Co. v. Smith* (Ala.), 33 R. R. R. 446, 56 Am. & Eng. R. Cas., N. S., 446, where all those preceding it are collected; third head-note of *Illinois Cent. R. Co. v. Dupree* (Ky.), 37 R. R. R. 88, 60 Am. & Eng. R. Cas., N. S., 88.

For the authorities in this series on the subject of the care due from railroad companies to trespassing children, see first foot-note

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killed while a trespasser on defendant's track, held, that the question whether the engineer saw the child in time to have prevented the injury by the use of proper means was for the jury.

Trial—Province of Court and Jury—Instructions—Emphasizing Part of Evidence.—The court cannot be required to give a charge which unduly emphasizes a part of the evidence.

Trial—Instructions—Argumentative Instructions.—The court cannot be required to give an argumentative instruction.

Trial—Instructions—Applicability to Issues.—In an action against a railroad company for the death of plaintiff's infant child while a trespasser on defendant's track, where the only issue was whether defendant railroad discovered the child on the track in time to have avoided injuring it by due care, and whether defendant, after discovery of its peril, negligently struck and killed the child, requested instructions as to the duty of the railroad to look out for the child were properly refused as not within the issues.

Trial—Instructions—Refusal—Instructions Already Given.—Requested instructions covered by those given are properly refused.

Evidence—Competency—Res Gestæ—Statements after Event.—In an action for the death of plaintiff's child while a trespasser on defendant's track, the testimony of a witness as to statements by the engineer shortly after the accident, to the effect that he kept thinking the child would get off the track until it was too late, was not admissible as part of the *res gestæ*.

Witnesses—Credibility—Inconsistent Statements.—In an action against a railroad for the death of plaintiff's child, killed while a trespasser on the track, where the proper predicate was laid, evidence of a statement by the engineer shortly after the accident, that he kept thinking the child would get off the track until it was too late, was admissible to show statements made by the witness, contrary to his testimony at trial.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Albert J. Smith, as administrator, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 163 Ala. 174, 50 South. 390, 55 South. 913.

Count 4 alleges the discovery of plaintiff's intestate on the track, by the agents or servants of the defendant operating the train which killed it, in time to have avoided injuring her by the exercise of due care and preventive effort, and that, after a dis-

of Denison & S. Ry. Co. *v.* Carter (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129, where all those preceding it are collected or referred to; second paragraph of foot-note of St. Louis, etc., R. Co. *v.* Williams (Ark.), 41 R. R. R. 786, 64 Am. & Eng. R. Cas., N. S., 786; last foot-note of Riedel *v.* West Jersey & S. R. Co. (C. C. A.), 36 R. R. R. 312, 59 Am. & Eng. R. Cas., N. S., 312.

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covery of her peril, they negligently permitted or propelled said locomotive to run against plaintiff's intestate, killing her. The following charges were refused to the defendant: (4) "You may take the testimony of this railroad man, Wilson. You may take into consideration any interest which he might have that would in any way influence his testimony here; but no inference unfair to a man should be drawn because he is in the employ of a railroad company. You will take into consideration the testimony of the plaintiff, and then weigh up the testimony on both sides, and say where, in your judgment, the truth lies, and what your duty is in giving weight to the testimony." (1) "The court charges the jury that, notwithstanding the deceased was a child, he was a trespasser on defendant's track at the time he was struck; and the engineer owed him no duty to keep a lookout." (2) "I charge you that the Smith child was a trespasser; and it was not the duty of the trainmen to keep a lookout for trespassers at the place where the child was killed." (9) "It was not the duty of the trainmen to keep a lookout for trespassers at the place where the child was when he was killed; and I charge you that he was a trespasser." (10) "The trainmen owed the deceased no duty to keep a lookout; and any negligence of the trainmen, sufficient to permit a recovery in this case, must have occurred after the child's presence on the track was discovered by them." (14) "The Smith child was a trespasser on the track; and the defendant's employees were not bound or required to keep any lookout for him at the place where he was killed."

L. E. Brown, of Scottsboro, for appellant.

Virgil Bouldin, of Scottsboro, for appellee.

SIMPSON, J. This is an action for damages on account of the death of the six year old child of the plaintiff (appellee here), caused by its being run over by defendant's train of cars at or near Larkinsville, Ala. The case has been before this court twice before. *Southern Railway Company v. Smith*, 163 Ala. 174, 50 South. 390, and *Id.*, 55 South. 913.

On this trial, all of the counts of the complaint, except count 4, were eliminated; and the first insistence of the appellant is that the general affirmative charge should have been given for the defendant.

[1, 2] While it is clear from the evidence, as held in this case on former appeals, that the child was a trespasser on the track, and the defendant owed him no duty, save to avoid injuring him after discovery of his peril, yet the facts were before the jury as to the distance from the station to the place of the injury, the straightness of the track, the speed at which the train was moving, and the distance within which the train could be stopped, the preventive efforts which were used, and as to whether or not any alarm was sounded. It was therefore for the jury to say

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whether or not the engineer did see the child in time to have prevented the injury by the use of the proper means. We adhere, then, to the ruling, made when this case was last before this court, that there was no error in the refusal to give the general affirmative charge in favor of the defendant.

[3, 4] The court cannot be placed in error for refusing to give charge 4. While it is true that such a charge, given by the court, was approved by the Supreme Court of Michigan (*Lovely v. Grand Rapids & I. Ry. Co.*, 137 Mich. 653, 100 N. W. 894), yet, without deciding whether the court would have been justified in giving said charge, under our decisions the court cannot be required to give such a charge, as it unduly emphasizes a part of the evidence, and is argumentative. *Bancroft v. Otis*, 91 Ala. 279, 291, 292, 8 South. 286, 24 Am. St. Rep. 904; *Crawford v. State*, 112 Ala. 1, 27, 21 South. 214; *Teague v. State*, 144 Ala. 42, 44, 49, 40 South. 312; *Austin v. State*, 145 Ala. 37, 38, 40, 40 South. 989; *Davis v. State*, 152 Ala. 82, 84, 86, 44 South. 545.

[5, 6] Charges 1, 2, 9, and 14, requested by the defendant, were abstract, as all questions about the duty to look out were eliminated by confining the issue to count 4; and charge 10 was covered by charges 5, 6, and 7, given at the request of the defendant.

[7, 8] There was no error in admitting the testimony of Mrs. Dave Downs as to what Wilson, the engineer, said shortly after the injury, to the effect that he kept thinking the child would get off the track until after it was too late. It is true that this testimony was not admissible as a part of the *res gestæ* to show how the injury occurred; but the evident purpose of introducing it was to show statements made by the witness, contrary to what he had stated on the stand. A predicate was laid for the introduction of the testimony for that purpose; and no objection was offered on account of the insufficiency of the predicate, but only on the ground that it was not a part of the *res gestæ*, which, as shown, was not apposite. *Jones v. State*, 141 Ala. 55, 58, 37 South. 390.

The judgment of the court is affirmed.

Affirmed. All the Justices concur.

JACOBS *v.* NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Plymouth, May 25, 1912.)

[98 N. E. Rep. 688.]

Explosives—Care Required.—A railroad company, which uses a dangerous explosive for torpedoes, must take every precaution to prevent personal injury to those rightfully on its premises from explosions which might be precipitated through the carelessness of its servants.

Explosives — Injuries from Accidental Explosion — Proximate Cause.—While a railroad company is bound to exercise the highest degree of care to protect those rightfully on its premises from injuries, by explosions from dangerous torpedoes used by its servants, it is not liable for an injury to deceased, who, with another small boy rightfully on the station platform, carried away a torpedo which they later exploded, with fatal results; the railroad company not being able to anticipate the act of the boys in carrying away the torpedo and exploding it.

Report from Superior Court, Plymouth County.

Action by Emeline A. Jacobs, administratrix of the estate of Stephen Jacobs, Jr., against the New York, New Haven & Hartford Railroad Company. There was a directed verdict for defendant. On report from the Superior Court. Judgment for defendant.

Chas. W. Bartlett, Jos. W. Bartlett, Fredk. E. Jennings, and Arthur T. Smith, all of Boston, for plaintiff.

Frank W. Knowlton and Roger B. Hull, both of Boston, for defendant.

BRALEY, J. The injuries to the plaintiff's intestate which resulted in his death after a period of conscious suffering, were caused by the explosion of a railroad signal torpedo, the property of the defendant. It may be assumed, that the jury would have been warranted in finding upon the evidence the following facts. In the management of its business as a carrier of passengers, trains were provided with torpedoes, which whenever necessary were to be used by the flagman on the train ahead to warn trains approaching from the rear, that a preceding train not very far distant was passing over the same track. The warning consisted in the noise of the explosion, as the oncoming train struck the torpedo, which the flagman affixed to the rail by straps forming a part of the apparatus. To be effective, not only the torpedo must be exploded by contact with the train, but the detonation must be sufficiently great to attract the attention of trainmen. The jury

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properly could infer from these circumstances, and from the testimony of the plaintiff's expert as to the character of the composition with which it was charged, as well as from the rule promulgated by the company, which was introduced in evidence, that the defendant knew, or by the use of due diligence should have known, that the torpedo contained a highly explosive compound. If exploded without proper precautions, or under extraneous conditions, pieces of the shell or case might fly with such force in various directions as to endanger the safety of persons in the vicinity. [1] The use of a dangerous agency of this nature, which must be classed with gunpowder, and explosives like nitroglycerine, and dynamite in its various forms, while lawful, imposed upon the defendant the duty of taking every proper precaution to prevent personal injury to those lawfully upon the company's premises from explosions which might be precipitated through the carelessness of its servants. *Derry v. Flitner*, 118 Mass. 131; *Oulighan v. Butler*, 189 Mass. 287, 292, 75 N. E. 726; *Dulligan v. Barber Asphalt Paving Co.*, 201 Mass. 227, 231, 87 N. E. 567. [2] The inquiry, accordingly, is whether the injury in question reasonably should have been anticipated by the defendant. *Obertoni v. Boston & Maine R. R.*, 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422. The train which came into the station where the intestate, a boy of fifteen years of age, and his young companions were waiting for the departure of friends, carried in the baggage car a torpedo to be used as a signal, which the jury could find was carelessly ejected by the defendant's baggage master, and fell within the railroad location. The evidence having warranted a finding that the intestate was not a trespasser, it would follow that if from the impact of the fall, or from the innocent intermeddling of bystanders whose presence might have been anticipated, an explosion had followed injuring him, the company as matter of law would not have been exonerated. *Lucas v. New Bedford & Taunton R. R.*, 6 Gray, 64, 66 Am. Dec. 406; *Bradford v. B. & M. R. R.*, 160 Mass. 392, 35 N. E. 1131; *McKone v. Michigan Central R. R.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596; *Illinois Central R. R. v. Hammer*, 72 Ill. 347; *Lane v. Atlantic Works*, 111 Mass. 136. But the defendant was not bound to foresee, that one of the intestate's companions actuated doubtless by a boy's impulse and curiosity in which apparently the intestate shared, to possess and explode the torpedo, would remove it almost immediately from the premises, and that after the lapse of ten days the experiment would be tried in the vicinity of their homes, and the intestate, who participated, would be fatally injured by the explosion. *Denny v. N. Y. Central R. R.*, 13 Gray, 481, 74 Am. Dec. 645; *Quigley v. Clough*, 173 Mass. 429, 430, 53 N. E. 884, 45 L. R. A. 500, 73 Am. St. Rep. 303; *Smith v. Peach*, 200 Mass. 504, 86 N. E. 908; *McDowell v. Great Western R. R. Co.* (1903) 2 K. B. 331. The

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accident is deplorable, but the wrongful asportation, which brought the intestate in contact with the exploding torpedo occasioned the mischief, and distinguishes the case at bar from *Lane v. Atlantic Works*, 111 Mass. 136, and the doctrine stated in *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 344, 80 N. E. 482. The injury not having been caused by its negligence, the presiding judge correctly ruled, that there could be no recovery under either count, and in accordance with the terms of the report judgment must be entered for the defendant on the verdicts.

So ordered.

SHELLY *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 21, 1912.)

[98 N. E. Rep. 575.]

Street Railroads—Trespassers on Cars—Liability.*—A boy a little over 10 years of age boarded a car of an elevated railway company to steal a ride. The conductor, on observing him, ordered him to get off, shaking his fist at the same time. The boy either lost his balance or fell in attempting to jump off. Held, that the boy was a willful trespasser, and the company owed him no duty except to refrain from willfully or wantonly and recklessly exposing him to danger, and the act of the conductor did not show a cause of action.

Action by Thomas Shelly against the Boston Elevated Railway Company. The court ordered a verdict for defendant, and reported the case for determination. Judgment on the verdict.

This was an action of tort for personal injuries sustained by plaintiff falling or jumping off a moving car of defendant. Plaintiff, a little over 10 years old, boarded the car to steal a ride. The conductor on discovering him ordered him to get off, shaking his fist at the same time. Plaintiff became frightened, and lost his balance, or attempted to jump off. The conductor did not lay his hand on plaintiff or touch him with anything.

John J. O'Connor, of Boston, for plaintiff.

MacPherson & Mahar, of Boston, for defendant.

HAMMOND, J. The plaintiff was a willful trespasser; and to him "the defendant owed no duty, except to refrain from will-

*For the authorities in this series on the subject of the care due trespassing children, see first foot-note of *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129, where all those preceding it are collected or referred to; second paragraph of foot-note of *St. Louis, etc., R. Co. v. Williams* (Ark.), 41 R. R. R. 786, 64 Am. & Eng. R. Cas., N. S., 786.

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fully or wantonly and recklessly exposing him to danger.” Knowlton, C. J., in *Bjornquist v. Boston & Albany R. R.*, 185 Mass. 130, 132, 70 N. E. 53, 54 (102 Am. St. Rep. 332). It is unnecessary to recite the evidence in detail. It is contradictory in many respects, but even if it be taken in the light most favorable for the plaintiff it falls far short of showing that the defendant failed to perform the limited duty it owed to the plaintiff. The case must stand in the class with *Bjornquist v. Boston & Albany R. R.*, *ubi supra*; *Albert v. Boston Elevated Railway*, 185 Mass. 210, 70 N. E. 52; *Massell v. Boston Elevated Ry.*, 191 Mass. 491, 78 N. E. 108; *Anternoitz v. New York, New Haven & Hartford R. R.*, 193 Mass. 542, 79 N. E. 789; *Lebov v. Consolidated Railway*, 203 Mass. 380, 89 N. E. 546, 26 L. R. A. (N. S.), 265, and similar cases.

Judgment on the verdict.

JONES *v.* NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, May 21, 1912.)

[98 N. E. Rep. 607.]

Evidence—Presumptions—Common Law.—In the absence of a contrary showing, it is presumed that the common law of Connecticut is the same as that of Massachusetts.

Highways—Highway by Prescription.—To constitute a public way by prescription, the use must be adverse, continued without interruption, and with the acquiescence of the landowner.

Railroads—Highway Crossings—Signal.*—Statutory requirement as to the sounding of bells and whistles at a public highway crossing would not apply to a railroad crossing over a private way.

Railroads—Injuries to Licensee.—One, not the owner of adjoining land, who undertook to pass over a private crossing for his own convenience was at most a bare licensee, and used the premises at his own risk, in the absence of wanton or willful conduct by the railroad company.

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Action by Augustus O. Jones against the New York, New Haven & Hartford Railroad Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

*See foot-note of *Central Kentucky Tract. Co. v. Glass* (Ky.), 41 R. R. R. 746, 64 Am. & Eng. R. Cas., N. S., 746; first foot-note of *Ressler v. Wabash R. Co.* (Iowa), 42 R. R. R. 724, 65 Am. & Eng. R. Cas., N. S., 724, where all the authorities in this series on the subject, preceding it, are collected.

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G. E. Tebbetts, of Boston, for plaintiff.

J. L. Hall, of Boston, for defendant.

DE COURCY, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while driving over the tracks of the defendant in that part of the town of Thompson known as Mechanicsville in the state of Connecticut. The place of the accident was within the premises of the French River Textile Company. The road upon which the plaintiff was driving led into the lands and buildings of that company and was kept in repair by it, as it had been by its predecessor in title who originally laid it out. The way never was laid out or accepted by public authorities.

[1, 2] The first contention of the plaintiff is that this road had become a public way by prescription, and that accordingly the provisions of the General Statutes of Connecticut, § 3787, with reference to sounding bells and whistles at crossings, applied. Under the laws of that state introduced in evidence, a period of fifteen years' uninterrupted use is necessary in order to acquire such right of way (Gen. Sts. Conn. § 1073); and in the absence of anything to the contrary the common law of Connecticut is presumably the same as that of this commonwealth in requiring the use to be adverse, continued without interruption, and with the acquiescence of the defendant. *Bence v. New York, New Haven & Hartford Railroad*, 181 Mass. 221, 63 N. E. 417. An examination of the testimony discloses no such public prescriptive right. The way across the tracks was created solely as a private way, for the convenience of the mill owner who conveyed the premises to the defendant's predecessor in title, and appears to have been used mostly by employees and others having business at the factory. The use of the crossing by the general public seems to have been merely incidental to an open private way and by permission of the owners, according to the testimony of the only witness whose observation covered the period of fifteen years.

[3, 4] Assuming, however, that there was some evidence for the jury that the public use of the way was adverse, the uncontradicted testimony shows that this use was interrupted and not continuous. Upon the Mechanicsville end of the road, across the bridge, was a gate which was closed and locked at times, preventing access to the mill property; and at the West Thompson end was a chain attached to posts which from time to time during the period in question prevented access to the way. Clearly the evidence would not warrant a finding that the way over which the plaintiff was crossing was a public way, and consequently the statutory requirements as to sounding bells and whistles at a highway crossing do not apply. *McCreary v. Boston & Maine Railroad*, 153 Mass. 300, 26 N. E. 864, 11 L. R.

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A. 359; *Sprow v. Boston & Albany Railroad*, 163 Mass. 330, 39 N. E. 1024; *Aikens v. New York, New Haven & Hartford Railroad*, 188 Mass. 547, 74 N. E. 929.

The evidence does not support the contention that the defendant invited the plaintiff to use this crossing. Under the reservation in its deed the railroad company was bound to leave the crossing open for the convenience of the Textile Company and those having business dealings with it. The defendant did not plank the crossing, nor grade its approaches; it maintained no gate or flagman or signs; and did no act which could be construed as an express invitation to the public; and it does not appear that it knew that the crossing was being used by any persons except those who were entitled to do so of right. Nor was there implied representation by the defendant to the plaintiff that the way was one which might be used with safety, or an inducement to use it as such. The way was laid out entirely within the enclosed premises of the Textile Company and maintained by it; the entrances were guarded by gates and chains; the plaintiff knew that it led directly into the factory yard, and had seen the chain when he entered the Thompson road; everything in sight indicated the true character of the way. When the plaintiff, for his own convenience, undertook to pass through this private way as a short cut between Thompson and Mechanicsville, he was at most a bare licensee and used the premises at his own risk; and as there was no evidence that the defendant was guilty of any wanton or willful conduct, the court rightly directed a verdict in its favor. This conclusion renders it unnecessary to consider the issue of the plaintiff's due care. *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Bowler v. Pacific Mills*, 200 Mass. 364, 86 N. E. 767, 21 L. R. A. (N. S.), 976, 128 Am. St. Rep. 432; *O'Brien v. Union Freight Railroad*, 209 Mass. 449, 95 N. E. 861.

Exceptions overruled.

PARSONS *v.* SYRACUSE, B. & N. Y. R. Co.

(Court of Appeals of New York, April 9, 1912.)

[98 N. E. Rep. 331.]

Railroads—Crossing Accidents—Contributory Negligence—Jury Question.—In an action against a railroad company for death of a traveler, whose vehicle was struck in the nighttime by a train at a highway crossing, held, under the evidence, a jury question whether he was guilty of contributory negligence.

Railroads—Crossing Accidents—Care of Traveler—Evidence—Sufficiency.*—In an action against a railroad company for death of a traveler, whose vehicle was struck in the nighttime by a train at a highway crossing, the fact that he was a man of prudent character, well acquainted with the crossing, and a few moments before the accident was conducting himself and managing his horse in a careful manner, is insufficient to sustain a finding that he actually looked and listened for an approaching train.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Horace J. Parsons, administrator, etc., of Samuel S. Parsons, deceased, against the Syracuse, Binghamton & New York Railroad Company. From a judgment of the Appellate Division (145 App. Div. 900, 129 N. Y. Supp. 1139), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Halsey Sayles, for appellant.

Edmund B. Jenks, for respondent.

HISCOCK, J. As plaintiff's intestate attempted to cross defendant's tracks in the nighttime with his wife in a covered buggy drawn by one horse, he was struck by a light engine, and both he and his wife were instantly killed. There were no surviving eye-witnesses of the accident, except the defendant's engineer, who did not see the intestate's conveyance until an instant before the accident. The evidence permitted the jury to find, amongst other things, that the night was dark, rainy, and somewhat misty; that the view in both directions was obstructed as intestate approached the crossing; that at a point 30 feet from the track one could see along the same in the direction whence the engine came somewhere in the neighborhood of 300 or 400 feet; that the engine

*See extensive note, 25 R. R. R. 242, 48 Am. & Eng. R. Cas., N. S., 242.

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approached at a speed of 60 miles an hour, without giving any sound signals, and without any light, except small classification lights, which one witness stated could be seen 700 feet; and that the plaintiff's intestate was a careful, prudent man, in possession of his faculties, and was well acquainted with the crossing.

[1] There is no question that the evidence permitted a jury to find that the defendant was guilty of negligence in the operation of its engine. The contention was and is that there was no evidence to sustain the burden, which plaintiff carried, of proving that his intestate was free from contributory negligence. The trial judge submitted this branch of the case to the jury on two theories. He charged that it was the duty of the intestate to "look and listen only in the event that the jury should find from the evidence in this case that it would have availed him, had he looked and listened." He also permitted the jury to find that the intestate did look and listen for the engine, and thereby exercise care and caution in approaching the crossing.

I think that the evidence justified the court in submitting the case to the jury on the first theory. Taking into account the speed of the engine, the absence of the usual signals either of sound or light, the character of the night, and the obstructions to the view, the jury might have found that the exercise of reasonable care by intestate in looking and listening for the approach of a train would not have enabled him to detect the approach of this light engine in time to escape the collision, and, therefore, have relieved him from the imputation of contributory negligence. *Wieland v. D. & H. Canal Co.*, 167 N. Y. 19, 24, 60 N. E. 234, 82 Am. St. Rep. 707; *Fejdowski v. D. & H. Canal Co.*, 168 N. Y. 500, 505, 61 N. E. 888; *Monck v. Brooklyn Heights R. R. Co.*, 97 App. Div. 447, 450, 90 N. Y. Supp. 818, affirmed 182 N. Y. 567, 75 N. E. 1131.

[2] But I think that the submission of the case on the other theory, that the jury might find that the intestate did actually look and listen, cannot be justified. There is, of necessity, no direct evidence that he did so, and there is no evidence of facts which justified an inference in his behalf on this point. There is simply the testimony in general terms that he was a man of prudent character, well acquainted with the crossing, and that a few moments before the accident he was conducting himself and managing his horse in a careful, prudent manner. These things might justify us as a result of ordinary experience in expecting that he would be careful in approaching the crossing, but they do not permit a jury to say as a matter of fact that he was so. Recently, in the case of *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209, we have had occasion to consider the probative value of evidence more direct than that here presented of a man's habits of care and caution as tending to establish his conduct on

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a given occasion, and have held such evidence to be insufficient for such purpose.

We are therefore forced to conclude that the charge on this was error, and that the judgment must be reversed, and a new trial granted; costs to abide event. *Fejdowski v. D. & H. Canal Co.*, supra.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. COLLIN, J., not sitting.

Judgment reversed, etc.

SIMON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fifth Circuit, March 5, 1912. Rehearing Denied April 9, 1912.)

[195 Fed. Rep. 56.]

Courts—Jurisdiction—Restraining Enforcement of Judgment Rendered by State Court.—The Circuit Court of the United States has jurisdiction of a suit by a citizen of one state against a citizen of another to enjoin the enforcement of a judgment against him, entered in a state court having no jurisdiction, for want of proper service of process.

Courts—Controlling Decisions.—A decision of the federal Supreme Court that the Circuit Court of the United States has jurisdiction of a suit is binding on the United States Circuit Court of Appeals on appeal from a decree of the Circuit Court.

Corporations—Foreign Corporations—Actions—Service of Process—Statutory Compliance.*—A service on the Assistant Secretary of State of Louisiana of process, in an action against a foreign corporation which had not named an agent on whom process might be served, is not the equivalent of service on the Secretary of State within Act. No. 54 of 1904 of Louisiana, providing that, where a foreign corporation has not filed in the office of the Secretary of State a written declaration setting forth the name of its agent in the state on whom process may be served, process may be served on the Secretary of State, and a default judgment against the foreign corporation on such service and without any appearance by the corporation is void for want of jurisdiction of the person.

Judgment—Jurisdiction of Person—Service of Process—Appearance.—Where there is neither valid service of process nor voluntary appearance of defendant, a judgment by default is void for want of jurisdiction of the person.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

*See note at end of case.

Simon v. Southern Ry. Co

Suit by the Southern Railway Company against Ephraim Simon to restrain the execution of a judgment recovered by Simon against the railway company in a state court. From a decree of the Circuit Court (184 Fed. 959) for complainant, defendant appeals. Affirmed.

See, also, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429.

The Southern Railway Company, a corporation organized under the laws of the state of Virginia, filed its bill to restrain Ephraim Simon, a citizen of the state of Louisiana, from enforcing a judgment rendered by the civil district court for the parish of Orleans, La., against it and in favor of Simon for damages claimed to have been suffered by him as the result of an accident, occurring in the state of Alabama, while he was a passenger on one of the trains of the railway company. A temporary injunction issued, and during its pendency Simon was arrested in a contempt proceeding wherein he was charged with violating the orders of the court. This proceeding found its way to the Supreme Court and is reported under the style of *Ex parte Simon*, in 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429, to which reference is made for a further statement. Upon the final hearing the temporary injunction was perpetuated, and from the decree Simon appeals to this court.

Henry L. Lazarus, Eldon S. Lazarus, Herman Michel, and David Sessler, for appellant.

J. Blanc Monroe and Monte M. Lemann, for appellee.

Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). Upon consideration of the issues involved in the present suit, the following conclusions are announced:

[1, 2] 1. That the Circuit Court had jurisdiction of the suit has been authoritatively decided in *Ex parte Simon*, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429. See, also, *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, and authorities therein cited. That decision is binding upon this court until reversed or modified by the Supreme Court.

2. At the time the petition was filed in the state court by the appellant to recover damages of the appellee, to wit, December 1, 1904, the latter was doing business in the parish of Orleans, state of Louisiana.

[3] 3. As to the service of process and validity of the judgment rendered by the state court against the appellee:

A copy of the citation was served on the Assistant Secretary of State, who simply deposited it among the files of his office. The appellee had no notice of the suit. Judgment by default

Simon v. Southern Ry. Co.

was taken and damages were assessed by the jury. Was the service sufficient? The pertinent act of the Legislature reads as follows:

"Section 1. Be it enacted by the General Assembly of the State of Louisiana: That it shall be the duty of every foreign corporation doing any business in this state to file in the office of the Secretary of State a written declaration setting forth and containing the place of locality of its domicile, the place or places in the state where it is doing business, and the name of its agent or agents or other officer in this state upon whom process may be served.

"Sec. 2. Be it further enacted, etc., that whenever any such corporation shall do any business of any nature whatever in this state without having complied with the requirements of section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the state where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served." Session Acts 1904, pp. 133, 134.

Prior to filing the suit in the state court, the appellee had not named an agent upon whom process might be served, and, as before stated, service was had upon the Assistant Secretary of State.

We are of the opinion that service upon the Assistant was not the equivalent of service upon the Secretary of State. It is a fundamental principle of our jurisprudence that a person, whether artificial or natural, must have the opportunity of a hearing before being condemned.

"It is," said the Supreme Court, "a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered." *Galpin v. Page*, 18 Wall. 368, 369, 21 L. Ed. 959.

See, also, *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

The method of service, indicated by the statute, was not pursued in this case, and, employing the language of the Supreme Court:

"The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations." *Amy v. Watertown*, 130 U. S. 316, 317, 9 Sup. Ct. 530, 32 L. Ed. 946, citing numerous authorities.

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And in the same case, at pages 317 and 318 of 130 U. S., at page 536 of 9 Sup. Ct. (32 L. Ed. 946), the court quotes approvingly the following language of the Supreme Court of Wisconsin used by the latter in *City of Watertown v. Robinson*, 69 Wis. 233, 236, 237, 34 N. W. 142:

"When the statute prescribes a particular mode of service, that mode must be allowed. *Ita lex scripta est*. There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be had excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute."

[4] The service of the citation upon the Assistant Secretary of State was not a compliance with the requirements of Act 54 of the Legislature of Louisiana, and such service was therefore unavailing to bring the appellee into court. Since then there was neither valid service of process nor voluntary appearance on the part of the appellee, the judgment by default was void for the want of jurisdiction of the person.

The conclusion reached by the court renders it unnecessary to call in question the constitutionality of Act 54 quoted above. But see *Gouner v. Missouri Valley Bridge & Iron Co.*, 123 La. 964, 49 South. 657.

The decree of the trial court perpetuating the injunction is right, and it is therefore affirmed.

Note.

PROCESS AGAINST CORPORATIONS—UPON WHOM SUMMONS MAY BE SERVED.

General Rules Applicable to Both Domestic and Foreign Corporations.

This note is divided into three main sections, Domestic Corporations, Foreign Corporations, and Railroads. Many of the general rules, however, unless inherently inapplicable to some, apply to all corporations.

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I. DOMESTIC CORPORATIONS.

1. Compliance with Statute.

In most of the states of the Union, and probably in all, there are statutes designating the persons upon whom process may be served where

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the action is against a corporation. And in order to bring a corporation into court, the statute applicable must be complied with.

United States.—*New River Mineral Co. v. Seeley* (C. C. A.), 120 Fed. Rep. 193.

Kansas.—*Union Pac. Ry. Co. v. Pillbury*, 29 Kan. 652.

Louisiana.—*Abney v. Louisiana, etc., R. Co.* (La.), 39 R. R. R. 131, 62 Am. & Eng. R. Cas., N. S., 131, 53 So. 678.

Missouri.—*Horn v. Missouri, etc., Ry. Co.*, 88 Mo. App. 470.

New Jersey.—*Roake v. Pennsylvania R. Co.*, 70 N. J. L. 494, 57 Atl. 160.

Ohio.—*Fee v. Big Sand Iron Co.*, 13 Ohio St. 563, approved in 36 O. St. 219.

Texas.—*Thompkins, etc., Imp. Co. v. Schmidt*, 4 Tex. App. Civ. Cases 194, 16 S. W. 174.

Citation to Be Left at Railroad's Office—Secretary Designated by Charter.—In *Abney v. Louisiana, etc., R. Co.* (La.), 39 R. R. R. 131, 62 Am. & Eng. R. Cas., N. S., 131, 53 So. 678, it is held that where a statute provides that a railroad company may be cited by leaving the citation at its office, a railroad cannot avoid the effect of such act by providing in its charter that its secretary shall be the proper person on whom a citation may be served.

"Manager" Not "Local Agent."—In *Thompkins, etc., Imp. Co. v. Schmidt*, 4 Tex. App. Civ. Cases 194, 16 S. W. 174, it is held that service of a writ on the "manager" of a domestic corporation is not sufficient, under Sayles' Civil St. Tex., art. 1223, providing that "the citation may be served on the president, secretary, or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought."

2. Officer or Agent Designated by Statute.

And where a statute points out the officer or agent or the class or classes of officers or agents of a corporation upon whom process against it may be served, the summons must be had upon the person so indicated or the corporation will not be bound thereby.

California.—*Kennedy v. Hibernia Sav., etc., Soc.*, 38 Cal. 154.

Colorado.—*Great Western Min. Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771.

Georgia.—*Hargis v. East Tenn., etc., R. Co.*, 90 Ga. 42, 15 S. E. 631.

Illinois.—*Kingman & Co. v. Mann*, 36 Ill. App. 338.

Indiana.—*Louisville, etc., R. Co. v. Thompson*, 62 Ind. 87.

Iowa.—*State Ins. Co. v. Granger*, 62 Iowa, 272, 17 N. W. 504.

Kansas.—*Chambers Bros. & Co. v. King, etc., Manufactory*, 16 Kan. 270; *Union Pac. Ry. Co. v. Pillsbury*, 29 Kan. 652.

Kentucky.—*Adams Express Co. v. Crenshaw*, 78 Ky. 136; *De Wolf v. Mallet*, 3 Dana (Ky.), 214; *National Bldg., etc., Ass'n v. Gallagher* (Ky.), 54 N. W. 209.

Louisiana.—*Collier v. Morgan, etc., Co.*, 41 La. Ann. 37, 5 So. 537; *Weight v. Liverpool, etc., Ins. Co.*, 30 La. Ann. 1186.

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Michigan.—*Detroit, etc., R. Co. v. Detroit*, 49 Mich. 47, 12 N. W. 904; *First Nat. Bank v. Burch*, 76 Mich. 608, 43 N. W. 453.

Minnesota.—*In re St. Paul, etc., Ry. Co.*, 36 Minn. 85, 30 N. W. 432.

Mississippi.—*Southern Express Co. v. Craft*, 43 Miss. 508.

New Jersey.—*Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442, 17 Atl. 1079.

Wisconsin.—*Smith v. Chicago, etc., Ry. Co.*, 124 Wis. 120, 15 R. R. R. 180, 38 Am. & Eng. R. Cas., N. S., 180, 102 N. W. 336.

Eminent Domain Proceedings on Acting Ticket or Freight Agent—Statutory Mode Exclusive.—*In re St. Paul, etc., Ry. Co.*, 36 Minn. 85, 30 N. W. 432, it is held that in proceedings under Minn. Gen. St. 1878, c. 34, title 1, to take private property for public uses, in the case of domestic corporations, the mode of service of notice provided in section 15, "upon the president, secretary, or any director or trustee of such corporation," is exclusive, and, therefore, service "upon any acting ticket or freight agent," under Minn. Laws 1871, c. 64, would not, in such proceedings, be legal service.

On Claim Agent, Where Person Responsible Should Be Notified of Injuries.—Wis. Rev. St. 1898, § 4222, subd. 5, requiring as a condition precedent to an action for injuries that a notice of the injuries, etc., shall be served on the one claimed to be responsible, in the manner required for service of summons in courts of record, is mandatory; and service on the claim agent of a railroad company is insufficient. *Smith v. Chicago, etc., Ry. Co.*, 124 Wis. 120, 15 R. R. R. 180, 38 Am. & Eng. R. Cas., N. S., 180, 102 N. W. 336.

3. Officer De Facto.

It has been held that the corporation will be bound if the service be had upon one who is its officer de facto, although not de jure. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623; *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Gross v. Nichols*, 72 Iowa 239, 33 N. W. 653; *Perry v. District Fair Society*, 95 Iowa 515, 64 N. W. 598; *City of Fort Scott v. Schulenberg*, 22 Kan. 648; *Stillman v. Associated Lace Makers' Co.*, 14 N. Y. Misc. 503, 35 N. Y. Supp. 1071.

Vacancy in Secretary's Office Filled by Director's.—An original notice served on one who was appointed by the directors of a corporation to fill a vacancy in the secretary's office and who acted as secretary with the knowledge of the other officers, is a good service on the corporation. *Perry v. District Society*, 95 Iowa 515, 64 N. W. 598.

Resignation Tendered, but Never Acted upon—Control of Affairs Retained.—Where an officer of a corporation tendered his resignation, but it was never acted upon, and he continued in control of its affairs, attended meetings of its board of directors, acted as director, and was recognized as such by his co-directors, and parties bringing an action against it and causing service of summons to be had upon him had no knowledge of his resignation, the corporation will not

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be permitted to claim that he had resigned prior to the service of process upon him. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623.

Still President De Jure after Election of Another as President Pro Tem.—In *Eel River Nav. Co. v. Struver*, 41 Cal. 616, an action against a corporation, where the summons was served upon B., who had been duly elected its president and presided at several meetings of its board of trustees, and who had never resigned, or been removed, or his office declared vacant, or a permanent president chosen in his place, though he had left the county and no longer took any part in the management of the corporation's affairs, and, at a meeting of the board after his so leaving the county, another person was elected president pro tem. for that meeting, and was regarded by the stockholders as the president, it was held that B. was still president de jure, and such service upon the corporation was valid.

4. Officer or Agent with Interest Opposed to That of Corporation.

It is generally held that the officer or agent of a corporation who is plaintiff in the suit against the latter, or has an interest antagonistic to that of the corporation involved in such action, cannot be served with process so as to bring the defendant corporation into court.

United States.—*Tortat v. Hardin Min. & Mfg. Co. (C. C.)*, 11 Fed. Rep. 426.

Illinois.—*St. Louis, etc., Co. v. Edwards*, 103 Ill. 472; *St. Louis, etc., Co. v. Sandoval, etc., Co.*, 111 Ill. 32.

Indiana.—*Rehm v. German Ins., etc., Inst.*, 125 Ind. 135, 25 N. E. 173.

Kansas.—*Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763.

Massachusetts.—*Buck v. Ashnelot Mfg. Co. v. Allen*, 4 Allen (Mass.), 357.

Michigan.—*Atwood v. Sault, etc., Power Co.*, 148 Mich. 224, 111 N. W. 747.

Oklahoma.—*Bes Line Constr. Co. v. Schmidt*, 16 Okl. 429, 85 Pac. 711.

South Carolina.—*George v. American Ginning Co.*, 46 S. Car. 1, 24 S. E. 41.

West Virginia.—*United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

Service upon Agent Who Has Assigned Cause of Action.—In an action against a corporation upon a claim for services by an agent assigned by such agent to plaintiff, service of summons upon such agent is not sufficient service upon the corporation. *White House, etc., Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

Cause of Action against Corporation Assigned by Director without Consideration—Service on Director.—In *Tortat v. Hardin Min. & Mfg. Co. (C. C.)*, 11 Fed. Rep. 426, it appeared that H., who was a resident manager in South Dakota of an Illinois Corporation, in which he was also a director, assigned a cause of action existing in his favor against the corporation to a friend without consideration for the pur-

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pose of having suit brought thereon by the assignee for his benefit, and by his direction such suit was brought in a state court, and the summons was served on him as manager of the corporation. It was held that such summons was void, H. being the real party in interest as plaintiff.

President of Defendant Attorney for Plaintiff.—But service of process upon the president of a corporation, who is attorney for plaintiff in the suit, is not void, but voidable upon proper exception thereto. *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

Action against Corporation by Its President—Service upon Both President and Secretary.—And in *Schaeffer v. Phoenix Brewery Co.*, 4 Mo. App. 115, it is held that in an action against a corporation, brought by its president, service of process upon its president and secretary is good, where there is no vice-president, under the statute in question. In this case it is said in the opinion: "We do not say that where the president of a corporation has a bona fide claim against it he might not direct summons to be served upon himself as president, in his own suit, and that such service would be necessarily bad, but we think that in this case, service being had upon both the president and the secretary, it was a good service, though the president was the plaintiff in the suit."

1 5. After Termination of Office or Agency.

After the termination of his office or agency, valid service cannot be had upon one as the officer or agent of a corporation. *Continental Wall-Paper Co. v. Voight & Sons Co. (C. C.)*, 106 Fed. Rep. 550; *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123; *Buchanan v. Prospect Park Hotel Co.*, 14 N. Y. Misc. 435, 35 N. Y. Supp. 712; *Yorkville Bank v. Zeltner Brewing Co.*, 80 N. Y. App. Div. 578, 80 N. Y. Supp. 839. *Eureka, etc., Co. v. California Ins. Co.*, 130 Cal. 153, 62 Pac. 393; *Thum v. Pyke*, 8 Idaho 11, 66 Pac. 157; *Cherry v. North, etc., R. Co.*, 59 Ga. 446; *Equitable Produce, etc., Exch. v. Keyes*, 67 Ill. App. 460; *Campbell Printing Press Co. v. Marder, etc., Co.*, 50 Neb. 283, 69 N. W. 774.

Resignation Prior to Service.—Where a person served with summons as the officer of a corporation files affidavits showing his resignation as such officer five days before he was served, it entitles the corporation to a grant of motion to set aside such service. *Continental Wall-Paper Co. v. Voight & Sons Co. (C. C.)*, 106 Fed. Rep. 550.

Late President of Defunct Corporation.—But in *Richmond, etc., Ry. Co. v. New York, etc., Ry. Co.*, 95 Va. 386, 28 S. E. 573, it is held that service of process on the late president of a defunct corporation is sufficient, though the process might have been served by publication, as prescribed by section 1103 of the Code of Virginia.

Defunct Corporation—Members of Last Acting Board of Directors.—And in proceedings against a defunct corporation, service of

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process upon the members of its last acting board of directors is sufficient, under Ohio Act March 7th, 1842. *Warner v. Callender*, 20 Ohio St. 190.

6. Expiration of Term of Office before Election or Appointment of Successor.

It is generally held that if the terms of office of the officers of a corporation expire before new officers are elected or appointed, valid service against the corporation may be had upon the old officers. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623; *Colorado Debenture Corp. v. Lombard*, 66 Kan. 251, 252, 71 Pac. 584; *Carnaghan v. Exporters', etc., Oil Co.* (N. Y. Sup. Ct.), 11 N. Y. Supp. 172; *Fridenburg v. Lee Constr. Co.*, 27 N. Y. Misc. 651, 58 N. Y. Supp. 391; *Hayden v. Bank* (N. Y. Sup. Ct.), 15 N. Y. Supp. 48; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209; *Jones v. Jefferson*, 66 Tex. 577, 1 S. W. 903.

Tender of Resignation by Director—Failure to Elect Successor.—Where the articles of incorporation of a company provide that its directors shall hold office until their successors are elected, and the company fails to elect a successor to a director who has tendered his resignation, the latter must be treated, in actions against the company, in so far as service of process upon him is concerned, as its duly constituted agent. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623.

Failure to Elect Successor—By-Law.—Where the by-laws of a corporation provide that an officer shall hold office until his successor is elected and qualified, service may be had on an officer who has resigned, when the corporation has failed to elect a successor. *Colorado Debenture Corp. v. Lombard*, 66 Kan. 251, 252, 71 Pac. 584.

Resignation of Director Not Accepted.—But in *Wilson v. Brentwood Hotel Co.*, 16 N. Y. Misc. 48, 37 N. Y. Supp. 655, it is held that service of process upon a director who has sent in his resignation is not binding upon the corporation, although such resignation has not been formally accepted, and its acceptance would reduce the number of directors to less than the minimum allowed by law.

7. Not upon Officer or Agent in His Individual Capacity.

To bind the corporation process must be served upon one as its officer or agent, and not upon him as a private individual. *Kirkpatrick Constr. Co. v. Central Elect. Co.*, 159 Ind. 639, 65 N. E. 913.

8. Officer or Agent Cannot Deny or Destroy His Relation.

Where process against a corporation has been served upon its proper officer or agent, the latter cannot render the service invalid by denying, or attempting to destroy, his status as such officer or agent, either fraudulently or otherwise. *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325; *Evarts v. Killing-*

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worth Mfg. Co., 20 Conn. 447; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

Gratuitous Transfer of Stock.—One who gratuitously transferred his stock in a foreign corporation to trustees, whose names he did not know, for some unknown and undefined purpose, and at the same time contributed \$50 to cover the expenses of the transfer, is still a stockholder in the corporation, within the meaning of Colorado Code of Civil Procedure, section 40, which authorizes service of process on a foreign corporation by delivery of the writ to a stockholder, when it has no agent or officer within the state. *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325.

Fraudulent Transfer of Stock to One Stockholder—Service upon Him.—A corporation passed a by-law providing that a president, secretary, and treasurer, should be chosen annually, and should hold their offices until others should be chosen in their stead. The corporation carried on its business in the town of K. for some time, when, being unsuccessful, it disposed of all its property, and closed its business, without the intention of resuming it, except for the purpose of collecting and paying out money, and holding a meeting of the stockholders. At a meeting subsequently held, all the stockholders except G., transferred to him all their shares of stock, and all the officers, including N., the secretary, resigned their offices, which resignations were accepted. These transfers of stock and resignations were made for the purpose and with the intention of preventing the bringing of any suit, or the legal service of any writ or process, against such corporation. A writ against the corporation was soon afterwards served, by attaching its property, and leaving copies with N., as secretary, and G., as president, who had held those offices, respectively, up to the time of such resignations. On a plea in abatement, for want of legal service, it was held that such transfers of stock and resignations, having been fraudulently made, had no efficacy to prevent service, and that the leaving of a copy with G. the only stockholder, would probably be deemed sufficient. *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447.

Local Employee Purchasing Real Estate for Corporation in the County as Its Principal Officer or Agent.—In *Cumberland Co. v. Lewis* (Ky.), 108 S. W. 347, on a motion to vacate a judgment against a foreign corporation for want of service of process, an affidavit of the person served stated that he was a local employee of the defendant company, purchasing real estate for it in the county, but that he was not its statutory agent; that the company was now doing business in the county, purchasing and taking title to lands in its own right and in its own name, and had complied with the law requiring corporations to designate an agent on whom service might be had, etc. It was held that the affidavit showed that affiant was a principal officer or agent, as defined in Ky. Code Civ. Prac. § 732, subsec. 33, on whom service of process might be had, notwithstanding his assertion to the contrary.

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Fraudulent Failure to Notify Company.—Service of notice or process upon the officer of a railroad company, authorized by its charter or the law to accept service, is good, although such officer may fraudulently conceal the fact of such service from the officers of the company. *Allen v. Dallas & W. R. Co. (C. C.)*, Fed. Cas. No. 221, 3 Woods, 316.

Director or Cashier—Denial of Authority.—Under Va. Code 1873, ch. 166, § 7, a return of summons, in a suit against a corporation, showing proper service upon a director or cashier of the defendant, is sufficient though they disclaim in their answers the right to answer officially. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

9. Subsequent Revocation of Agency.

After service of process has been duly had upon one as the agent of a corporation, the latter cannot render the service invalid by revoking the agency. *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737.

Such Service Previously Accepted by Corporation.—In *Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323, it is held that service of summons on a corporation is sufficient when it is shown to have been served upon some one who had theretofore been served with process, and the corporation had accepted such service by its appearance; and this is especially true when it is not shown that the corporation through its attorney, or some one else authorized to act for it, did not inform the party in interest how better service could be made.

10. Chief Officer.

At common law service of process upon the chief officer of a domestic corporation is binding upon the latter. *East Tenn., etc., R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *Adams Express Co. v. Crenshaw*, 78 Ky. 136; *De Wolf v. Mallet*, 3 Dana (Ky.), 214; *Southern Exp. Co. v. Craft*, 43 Miss. 508; *Chicago, etc., R. Co. v. Manning*, 23 Neb. 553, 37 N. W. 484.

11. Chief Officer or Agent in County.

Some statutes provide that process against a domestic corporation may be served upon its chief officer or agent in the county where the action is brought. *Adams Express Co. v. Crenshaw*, 78 Ky. 136; *Hill v. St. Louis, etc., Co.*, 90 Mo. 103, 2 S. W. 289.

12. President.

Even in the absence of any statutory provision on the subject, a corporation may be brought into court as defendant by serving the process upon its president.

Alabama.—*East Tenn., etc., R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *Walker v. Hallett*, 1 Ala. 379.

California.—*Kennedy v. Hibernia Sav., etc., Soc.*, 38 Cal. 151.

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Georgia.—*Steiner v. Central R. Co.*, 60 Ga. 552.

Illinois.—*Grand Tower, etc., Co. v. Schirmer*, 64 Ill. 106; *Illinois, etc., Co. v. Kennedy*, 24 Ill. 319.

Indiana.—*Supreme Council of the Catholic Benevolent Legion v. Boyle*, 15 Ind. App. 342, 44 N. E. 56.

Kentucky.—*De Wolf v. Mallet*, 3 Dana (Ky.), 214.

Louisiana.—*First Municipality of New Orleans v. Rector, etc., of Christ Church*, 3 La. Ann. 453.

Mississippi.—*Southern Express Co. v. Craft*, 43 Miss. 508.

Missouri.—*Pipkin v. Nat. Loan & Inv. Ass'n*, 80 Mo. App. 1.

New Jersey.—*Pennsylvania R. Co. v. Bennett*, 47 N. J. L. 275.

New York.—*Barrett v. Chicago, etc., R. Co.*, 4 Hun (N. Y.), 114; *Fridenberg v. Lee Constr. Co.*, 27 N. Y. Misc. 651, 58 N. Y. Supp. 391.

South Carolina.—*Glaize v. South Carolina R. Co.*, 1 Strob. (S. Car.), 70; *Merriwether v. Bank of Hamburg*, Dud. L. (S. Car.), 36.

On Principal Officer within Jurisdiction.—At common law, process against a corporation must be served on its head or principal officer, within the jurisdiction of the sovereignty where the artificial body exists. *Barrett v. Chicago, etc., R. Co.*, 4 Hun (N. Y.), 114.

California Statute.—Under the statute of California in question, to render the process of attachment effectual against a corporation, as garnishee, the writ and notice must be served on the president, or other head of the same, or the secretary, cashier, or other "managing" agent. *Kennedy v. Hibernia Sav., etc., Soc.*, 38 Cal. 151.

Colorado Statute.—In an action against a corporation, if the president be not found, process may be served, under Colo., Rev. St., p. 501, § 4, upon any other of its officers or agents. *Golden Paper Co. v. Clark*, 3 Colo. 321.

President Must Reside within State—Posting Name in Company's Offices.—It is only when the president of an express company resides in Georgia, that service of process is required to be made upon him by Ga. Code, § 3412. And posting his name in each office where the company transacts business, is of no efficacy unless he resides in the state, whether his office be in the state or not. *Southern Exp. Co. v. Skipper*, 85 Ga. 565, 11 S. E. 871.

Illinois Statutes.—Under the statutes of Illinois, service of process on a corporation may be had by leaving a copy with its president, or, if he cannot be found in the county, by leaving it with some of the officers specified in the statute, or any agent of the corporation found in the county. *Gilchrist Transp. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558; *Crowley, Cook & Co. v. Sumner*, 97 Ill. App. 301.

Upon Agent in Any County Other than That of President's Residence.—Process may be served upon an agent of a corporation in any county, provided its president does not reside in the county where the process is issued. *Peoria Ins. Co. v. Warren*, 28 Ill. 429; *Grand Tower, etc., Co. v. Schirmer*, 64 Ill. 106; *Cairo & N. R. Co. v. Joiner*, 72 Ill. 520.

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Officers Not Found—Person in Charge of Usual Place of Business—Foreign Corporations—Application of Statute.—Under sec. 912 of the civil code of Nebraska, a summons against a corporation may be served upon its chief officer, if he be found in the county, if not so found, then upon its cashier, treasurer, secretary, clerk, or managing agent, or if none of these can be found, by copy left at the office or usual place of business of such corporation, with the person having charge thereof. This, as well as section 914, applies to foreign corporations, except where there are special provisions to the contrary. *Chicago, etc., R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 484.

Court for Trial of Small Causes—New Jersey Laws.—In Pennsylvania *R. Co. v. Bennett*, 47 N. J. L. 275, it is held that summons issued out of the court for the trial of small causes, against a corporation, must be served upon its president, treasurer, cashier, or clerk, if found, and if not found, on any of its directors or managers.

Chief Executive Officer.—Under Pa. act June 13, 1836, sec. 41, P. L. 579, the person referred to as the "president or other principal officer" means the chief executive officer of the corporation, though called president, chairman, or by any other title. *Dale v. Blue Mountain Mfg. Co.*, 167 Pa. St. 402, 31 Atl. 633.

13. Duty to Notify Corporation.

It has been held that service upon any officer or agent of a corporation whose duty it is to notify those in control of the corporation of the fact of such service will confer jurisdiction over the latter.

United States.—*Strain v. Chicago Portrait Co. (C. C.)*, 126 Fed. Rep. 831.

Alabama.—*King & Hogan v. Harbor Board*, 57 Ala. 135.

Arkansas.—*Arkansas Const. Co. v. Mullins*, 69 Ark. 429, 64 S. W. 225.

Kansas.—*Federal Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560.

Maryland.—*Central of Georgia Ry. Co. v. Eichburg (Md.)*, 27 R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356, 68 Atl. 690.

Missouri.—*Heltzell v. Chicago, etc., R. Co.*, 16 Am. & Eng. R. Cas. 619, 77 Mo. 315; *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534.

Nebraska.—*Chicago, etc., R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 484.

New Jersey.—*Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123; *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312.

New York.—*Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.), 369.

Presumptive Duty to Notify Corporation.—In the absence of statutory provisions, process in an action against a corporation is sufficient if served upon some person upon whom it may fairly be presumed the duty devolves by virtue of his official position, or of his employment, to communicate the fact of service to the governing power of the corporation; and service on such person is service on the corporation. *Central of Georgia Ry. Co. v. Eichburg (Md.)*, 27 R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356, 68 Atl. 690.

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Secretary and Treasurer.—It will be inferred, in the absence of proof to the contrary, that a person holding the offices of secretary and treasurer in a business corporation is, either in his official capacity or by virtue of his employment, an officer or agent whose duty it is to communicate the fact of service of process upon the corporation to its governing body. *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123.

Secretary.—In the absence of any statutory mode of service of a notice upon a corporation, when it cannot be had upon its chief officer or managing agent, service upon any officer whose official relation to the governing body, or managing agent, or chief officer, would make it his duty to communicate the notice to the corporation, will be sufficient; and the secretary of a corporation is such an officer. *Heltzell v. Chicago, etc., R. Co.*, 16 Am. & Eng. R. Cas. 619. 77 Mo. 315.

Duty to Notify Principal.—As a general rule, where it is sought to bind a corporation by service of process on an agent or employee in another state, such agent or employee should sustain such relation to the matter, growing out of the character of his employment, as would impose on him the duty to report the fact to his principal or employer. *Strain v. Chicago Portrait Co. (C. C.)*, 126 Fed. Rep. 831.

14. Vice-President.

Where a statute provides for service upon the president, in his absence process may be served upon the vice-president. *Cook v. Imperial Building Co.*, 152 Ill. 638, 38 N. E. 914; *Pond v. National Mortg., etc., Co.*, 6 Kan. App. 718, 50 Pac. 973; *Balmford v. Grand Lodge*, 16 N. Y. Misc. 4, 37 N. Y. Supp. 645.

Garnishment—Temporary Absence of President.—But service of garnishment upon a domestic corporation whose president resides in Georgia, must be upon the president, and cannot be effected upon a subordinate officer or agent though the president be temporarily absent. *Steiner v. Central R. Co.*, 60 Ga. 552.

15. In Absence of Chief Officers.

The statutes generally provide that when the chief officers of a corporation cannot be found, the service may be made upon some other designated officers or agents, and the service in such case is not binding unless the statute applicable is strictly complied with. *Chicago, etc., R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 484; *Weaver v. Southern Oregon Co.*, 30 Ore. 348, 48 Pac. 167; *Chicago, etc., Co. v. Conglon Brake Shoe Mfg. Co.*, 111 Ill. 309; *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563, approved in 36 O. St. 219; *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534; *Golden Paper Co. v. Clark*, 3 Colo. 321.

Inferior Clerk or Agent—Sufficiency of Return.—In *Weaver v. Southern Oregon Co.*, 30 Ore. 348, 48 Pac. 167, it is held that where service upon a private corporation is made on some inferior clerk or

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agent, the return must show the facts authorizing such substituted service. See also *Caro v. Oregon, etc., R. Co.*, 10 Oreg. 510.

16. Officer an "Agent."

It has been held that the president or other officer of a corporation is an "agent" within the meaning of statutes providing that process against a corporation may be served upon any of its agents. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623.

President or Vice-President.—Under a statute providing that service of process may be made upon "any agent" of a foreign corporation, the service may be made upon its president or vice-president. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623.

Vice-President an "Agent."—The vice-president of a corporation is an "agent," within the meaning of a statute providing for service of process upon it. *Cook v. Imperial Bldg. Co.*, 152 Ill. 638, 38 N. E. 914.

17. Clerk or Bookkeeper Not an "Agent."

A mere clerk or bookkeeper is not an "agent" of the corporation by which he is employed, within the meaning of such statutes. *Schmidlapp & Co. v. La Confiance Ins. Co.*, 71 Ga. 246; *Chambers Bros. & Co. v. King, etc., Manufactory*, 16 Kan. 270; *Beattyville Coal Co. v. Bamberger, Bloom & Co.'s Assignee (Ky.)*, 53 S. W. 31; *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 909; *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312.

Bookkeeper.—A bookkeeper is not an officer or agent within the meaning of Act No. 175, Mich. Laws 1885, authorizing garnishee proceedings against corporations, and has no power to appear for or bind his corporation in such proceedings. *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 909. But see *First Nat. Bank v. Turner*, 30 Neb. 80, 66 N. W. 290.

18. Managing Agent.

Nearly all of such statutes make the managing agent or manager of a corporation a proper person upon whom to serve process against it.

United States.—*Denver, etc., R. Co. v. Roller (C. C. A.)*, 18 Am. & Eng. R. Cas., N. S., 595.

Alabama.—*East Tenn., etc., R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

California.—*Kennedy v. Hibernia Sav., etc., Soc.*, 38 Cal. 151.

Kansas.—*Federal Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560.

Nebraska.—*Porter v. Chicago, etc., Ry. Co.*, 1 Neb. 14.

New York.—*Brun v. Northwestern Realty Co.*, 52 N. Y. Misc. 528, 102 N. Y. Supp. 473; *Ruland v. Canfield Pub. Co.*, 18 N. Y. Civ. Proc. 282, 10 N. Y. Supp. 913.

Oregon.—*Coast Land Co. v. Oregon Col. Co.*, 44 Ore. 483, 75 Pac. 884.

Absence of Principal Officers—Montana Statutes.—In *Congdon v. Butte Consol. Ry. Co.*, 17 Mont. 481, 43 Pac. 629, it is held that, under the Montana statutes, a return of service upon a managing agent of

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a corporation need not show that its principal officers named in section 75, First Division of Mont. Comp. Sts. could not be found.

Business Manager.—But in *Scorpion S. M. Co. v. Marsano*, 10 Nev. 270, it is held that service upon the business manager of a corporation is not a compliance with a statute requiring the service to be upon the “managing agent.”

19. Assistant Manager.

In the absence of the manager of a corporation, such a statute is complied with when process is served upon its assistant manager. *Tennent-Stribbling Co. v. Hargar-McKittrick Co.*, 58 Ill. App. 368.

An assistant manager of a corporation is *ex necessitate* its agent; and service of process upon him, in the absence of the president from the county, is sufficient. *Tennent-Stribbling Co. v. Hargar-McKittrick Co.*, 58 Ill. App. 368.

20. Definition of Managing Agent.

To be a managing agent of a corporation, within the meaning of statutes providing for service of process against corporations, he must have general control of the corporate affairs and the right to exercise his discretion when acting for the corporation. *United States v. American Bell Telephone Co. (C. C.)*, 29 Fed. Rep. 17; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 30 Pac. 765; *Great West Min. Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771; *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560; *Parsell v. Thayer*, 39 Mich. 469; *Ritchie v. Illinois Cent. R. Co.*, 87 Neb. 631, 38 R. R. R. 600, 61 Am. & Eng. R. Cas., N. S., 600, 128 N. W. 35; *Ord Hardware Co. v. Case, etc., Co.*, 77 Neb. 847, 110 N. W. 551; *Ruland v. Canfield Pub. Co.*, 18 N. Y. Civ. Proc. 282, 10 N. Y. Supp. 913; *Winslow v. Staten Island, etc., Co.*, 51 Hun 298, 4 N. Y. Supp. 169; *Palmer v. Chicago Evening Post Co.*, 85 Hun 403, 32 N. Y. Supp. 992; *Schryver v. Metropolitan Life Ins. Co.*, 29 N. Y. Supp. 1092; *Taylor v. Granite State, etc., Ass'n*, 136 N. Y. 343, 32 N. E. 992.

21. Same—Working under Instructions.

It follows that one obliged to follow instructions when acting for a corporation, and without authority to use his discretion in its behalf, cannot be its managing agent for the purpose of accepting service. *Kennedy v. Hibernia Sav., etc., Soc.*, 38 Cal. 151; *Great Western Min. Co. v. Woodmas*, 12 Colo. 46, 20 Pac. 771; *Ritchie v. Illinois Cent. R. Co.*, 87 Neb. 631, 38 R. R. R. 600, 61 Am. & Eng. R. Cas., N. S., 600, 128 N. W. 35; *Ruland v. Canfield Pub. Co.*, 18 N. Y. Civ. Proc. 282, 10 N. Y. Supp. 913.

One Having General Supervision of Corporate Affairs within State.—In *Wickham v. South Shore Lumber Co.*, 89 Wis. 23, 61 N. W. 287, it is held that where, in violation of sec. 1750 Wis. Rev. St., the principal office and books of a domestic corporation are kept outside of West Virginia, and its principal managing officer, though claiming to

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be a resident of the state, actually resides in another, and none of its general officers reside within the state, one who, in the absence of such managing officer, has general supervision of the affairs of the corporation in the state, and who is its only agent therein who seems to have general powers, will be held to be its "managing agent" upon whom process may be served, within the meaning of Subd. 10, sec. 2637, Wis. Rev. St.

Of Foreign Railroad Company.—A managing agent of a foreign railroad corporation for purpose of service of process must be some person vested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of his duties and the manner of executing it. *Ritchie v. Illinois Cent. R. Co.*, 87 Neb. 631, 38 R. R. R. 600, 61 Am. & Eng. R. Cas., N. S., 600, 128 N. W. 35.

Management within State.—In *United States v. American Bell Tel. Co. (C. C.)*, 29 Fed. Rep. 17, it is held that the term "managing agent" implies the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same within the limits of the state, for and on account of the defendant corporation.

Division Superintendent.—In *Brayton v. New York, etc., R. Co.*, 72 Hun 602, 25 N. Y. Supp. 264, it is held that a "division superintendent" of a large and important division of a railroad, remote from the general offices of the company, is a "managing agent" of the corporation, within the meaning of a statute providing for personal service of summons upon a domestic corporation through a managing agent.

General Agent of Passenger Department.—In *Tuchband v. Chicago, etc., R. Co.*, 16 N. Y. Civ. Proc. 241, 5 N. Y. Supp. 493, it appeared that the summons in an action against a foreign railroad corporation was served upon one described in its time-tables as "general agent, passenger department, 261 Broadway, New York." It was held that he was the "managing agent" of the defendant within the provisions of the New York Code of Civil Procedure providing for the service of summons upon foreign corporations.

General Superintendent of Operation of Telegraph Lines.—The general superintendent of the work of operating the lines of a domestic telegraph company is its "managing agent," within the meaning of a statute providing for service of summons on domestic corporations. *Barrett v. American Tel., etc., Co.*, 138 N. Y. 491, 34 N. E. 289.

Superintendent in Locality.—In *Behan v. Phelps*, 27 N. Y. Misc. 718, 59 N. Y. Supp. 713, it is held that where a director, and the treasurer, of a corporation holds a person out as its superintendent in a certain locality, such person is sufficiently a "managing agent" to preclude a receiver of the corporation from attacking the service

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upon such agent of a summons against the corporation, no collusion between the plaintiff and the corporation being shown.

Baggage Master—Action for Loss of Baggage.—A suit can not be legally commenced against a railroad corporation, for loss of baggage or anything else, by service of a summons on a baggage master in its employ; he not being such a “managing agent” as the statute in question contemplates. *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.), 308.

Assisting Secretary.—An assistant secretary of a foreign railroad corporation, whose duty consists in making such records as he may be expressly directed to make, is not one of its “managing agents,” within a statute authorizing service of process upon the company by delivery of summons to a “managing agent.” *Sterett v. Denver, etc., R. Co.*, 17 Hun (N. Y.), 316.

President of Street Railway Employed to Superintend Running of Horse Cars on Unfinished Steam Railroad.—In *Emerson v. Auburn, etc., R. Co.*, 13 Hun (N. Y.), 150, it appeared that T., the president and superintendent of a street railway in a certain city, was employed by the defendant, a steam railroad company, to superintend the running of horse cars on a portion of defendant’s road not then completed. T. had no authority to make contracts for the defendant, except to purchase horses and feed, nor had he any control over or knowledge of the affairs of the defendant, or its books, and his employment was during the pleasure of defendant’s president. It was held that summons, in an action against defendant, could not be served upon T. as its “managing agent.”

Telegraph Operator in Charge of Placing of Wires in Defined Sections.—A telegraph operator who has charge of the placing of wires in certain defined sections under the orders of the chief operator is not a “managing agent” of a telegraph company, within the provisions of the New York Code of Civil Procedure relating to the service of summons upon corporations. *Jepson v. Postal Telegraph Cable Co.*, 22 N. Y. Civ. Proc. 434, 20 N. Y. Supp. 300.

Agent in Charge of Branch Store.—In *Osborne & Co. v. Columbia County, etc., Corp.* 9 Wash. 666, 38 Pac. 160, it is held that service of summons upon the agent of a domestic corporation, in charge of a branch store of his principal, is not sufficient under Wash. Laws 1893, p. 409, sec. 7, subd. 8, he not being one of its “managing agents.”

Assistant Treasurer.—The claim that the assistant treasurer of a domestic corporation was one of its “managing agents,” within a statute providing for service of process upon it, can not be sustained, where the proof merely showed that, while he was engaged in and about the business of the corporation, and in addition to his ordinary duties as its clerk, he was in the habit, as assistant treasurer, of drawing checks payable to the order of another clerk of the corporation, yet there was no evidence that he had any part in the management of the business of the corporation, or that he exercised any

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authority as a managing agent. *Winslow v. Staten Island, etc., Co.*, 51 Hun 298, 4 N. Y. Supp. 169.

Attorney Authorized to Apply for Land Patent.—An attorney in fact, authorized by a corporation to apply for a patent to mining ground claimed by it and to execute such papers as may be necessary for the purpose, is not by virtue of such employment a “managing agent,” within the meaning of that term as used in section 4898, S. Dak. Comp. Laws. *Mars v. Oro Fino Min. Co.*, 7 S. Dak. 605, 65 N. W. 19.

Bank Teller.—In the case of a banking corporation, service of process on the teller, whose only duty is to receive and pay out all moneys which come into and go out of the bank, is not sufficient to bind the corporation, he not being a “managing agent” within the meaning of the statute in question. *Kennedy v. Hibernia Sav., etc., Soc.*, 38 Cal. 151.

Charge of Branch Office—Authority to Transfer Stocks and Receive Assessments.—A defendant foreign corporation, all of whose officers resided in the foreign state, had no place of business in the state of New York, except a branch office, at which its stock could be transferred and assessments be received for transmission to the foreign state. It employed B. to take charge of such office, and to transfer stock and receive and transmit assessments, as directed by defendant’s officers. It was held that B. was not a “managing agent” of the corporation under a statute authorizing service of summons upon the corporation by its delivery to one of its “managing agents.” *Reddington v. Mariposa, etc., Co.*, 19 Hun (N. Y.), 405.

Clerk in Store of Foreign Mining Corporation—Custody of Funds—Not “Cashier” or Managing Agent.—A person employed by a foreign mining corporation as a clerk in a store belonging to it is not the managing agent or cashier of the corporation upon whom summons may be served, within the meaning of section 542 of the California Code of Civil Procedure, although he has the custody of money belonging to the corporation, and it is a part of his duty to keep the accounts of the men employed in a mine belonging to the corporation from data furnished him by the superintendent, and to pay them; the word “cashier” in such section referring to an executive officer of a corporation, such as the cashier of a bank, and not to an employee who is not a managing agent. *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 30 Pac. 765.

Local Insurance Agent.—In *Bain & Brinckerhoff v. Globe Ins. Co.*, 9 How. Pr. (N. Y.), 448, it is held that an agent of an insurance company, properly appointed and qualified to procure insurance for the company, residing at a different place from where the principal office of the company is located, is such a “managing agent” that legal service of a summons and complaint against the company may be made by service on him.

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22. Same—In Charge of One Department Only.

But to be a managing agent for a corporation, within the meaning of such statutes, it is not necessary that one should have entire control of all the corporation's property, affairs and business, in every department or locality where the corporation has property, business or affairs. It is sufficient if he has authority to exercise discretion and control in behalf of the corporation with respect to one such department or locality. *Hat-Sweat Mfg. Co. v. Davis Sewing-Mach. Co.* (C. C.), 31 Fed. Rep. 294; *Parsell v. Thayer*, 39 Mich. 469; *Porter v. Chicago, etc., Ry. Co.*, 1 Neb. 14; *Barrett v. American Tel., etc., Co.*, 56 Hun (N. Y.), 430, 10 N. Y. Supp. 138; *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 48 Hun (N. Y.), 190; *Ives v. Metropolitan Life Ins. Co.*, 78 Hun 32, 28 N. Y. Supp. 1030; *Mullins v. Metropolitan Life Ins. Co.*, 78 Hun 297, 28 N. Y. Supp. 959; *Palmer v. Chicago Evening Post Co.*, 85 Hun 403, 32 N. Y. Supp. 992; *Taylor v. Granite State Provident Ass'n*, 20 N. Y. Supp. 135, 47 N. Y. St. Rep. 882.

General Supervision in District.—An agent who has the general supervision of the business of a corporation is a "managing agent," although the district in which his powers can be exercised is limited. *Mullins v. Metropolitan Life Ins. Co.*, 78 Hun 297, 28 N. Y. Supp. 959.

General Control of Business at Place.—An agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the 75th section of the Code of Nebraska, upon whom summons may be served; and it is immaterial where he resides. *Porter v. Chicago, etc., Ry. Co.*, 1 Neb. 14.

Exclusive Management of Department.—One who has exclusive supervision and control of some department of a corporation's business, the management of which requires of such person the exercise of independent judgment and discretion, and the exercise of such authority that it may be fairly said that service of summons upon him will result in notice to the corporation, is a "managing agent," within the meaning of a statute providing for the service of summons upon a "managing agent" of a foreign corporation. *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560.

General Superintendent of Department.—Personal service of summons, in an action against a corporation, upon the general superintendent of the company, who has charge of one of its departments, is sufficient, he being one of its "managing agents." *Barrett v. American Tel., etc., Co.*, 56 Hun 430, 10 N. Y. Supp. 138.

"General or Special Agent" of Railroad.—The "general or special agent" of a railroad corporation upon whom a summons in garnishment may be served, under Mich. Comp. L. § 6463, is an agent having a general or special controlling authority, either generally or in

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respect to some particular department of corporate business. *Parsell v. Thayer*, 39 Mich. 469.

Division Superintendent.—The division superintendent is a “managing agent” of the railroad company with respect to work done on his division of the railroad, in violation of an injunction, within the meaning of § 431 of the New York Code of Civil Procedure, which prescribes the mode of service on corporations. *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 48 Hun (N. Y.), 190.

Agent with Office in State—Substantial Portion of Business.—Where a foreign railroad corporation has an office in New York in which a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating his agency to be confined to some one department, such agent is a “managing agent” within the meaning of the New York Code of Civil Procedure, as to the service of summons upon a foreign corporation defendant. *Tuchband v. Chicago, etc., R. Co.*, 115 N. Y. 437, 22 N. E. 360.

Penal Action for Violation of Patent Law—Control of Business within District.—In a local action for penalties for stamping articles as patented, without license, recoverable only in the district where the stamping is done, an agent of a foreign corporation who has the general management and control within the district of the manufacturing business in the course of which the stamping is done, is a “managing agent” of the corporation, within the meaning of § 432, of N. Y. Code Civ. Proc., and service upon him is a valid service upon the corporation. *Hat-Sweat Mfg. Co. v. Davis Sewing-Mach. Co. (C. C.)*, 31 Fed. Rep. 294.

Managing Agents in Different Localities.—In *Ives v. Metropolitan Life Ins. Co.*, 78 Hun 32, 28 N. Y. Supp. 1030; it is held that a corporation may have different “managing agents” in different localities.

Management of Department Not Sufficient.—But in *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. (N. Y.), 183, it is held that to authorize legal service of summons and complaint upon a foreign corporation, where it is made upon its managing agent in New York, under § 134 of the Code, the managing agent must be one whose agency extends to all transactions of the corporation, one who has, or is engaged in, the management of the corporation in distinction from the management of a particular branch or department of its business.

23. Any Agent.

Some statutes provide that process against a domestic corporation may be served upon any of its agents found within the jurisdiction of the court. *Chicago, etc., R. Co. v. Suta*, 123 Ill. App. 125; *Sievers v. Dalles, etc., Nav. Co.*, 24 Wash. 302, 64 Pac. 539; *Arkansas Const. Co. v. Mullins*, 69 Ark. 429, 64 S. W. 225; *Medical College v. Rushing*, 124 Ga. 239, 52 S. E. 333; *Great West Min. Co. v. Wood-*

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mas, 12 Colo. 46, 20 Pac. 771; *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560.

Any Agent in County of His Residence or That of Principal Office.—In *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123, it is held that service of process on any corporation, other than a bank of circulation, may be on any agent thereof in the county or municipal corporation in which he resides or in which the principal office of the corporation is located, whatever may be the employment of such agent.

Test of Agency.—In *Chicago, etc., R. Co. v. Suta*, 123 Ill. App. 125, it is held that a person not hired or paid by a corporation and who is not subject to its orders and cannot be discharged by it and who performs no functions in its behalf, is not such an agent of the corporation as represents it for purposes of service of summons.

24. Designated by Corporation.

Some statutes require a corporation to designate agents or officers upon whom process, in actions against it, may be served, and service upon one so selected will confer jurisdiction over the corporation. *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81, 10 N. E. 729; *Frazier v. Kanawha, etc., Ry. Co.*, 40 W. Va. 224, 21 S. E. 723.

25. Any Agent in Charge of Business Creating Cause of Action.

There are statutes providing for the service of process, in an action against a corporation, upon any agent in charge of its business in the county where the suit is brought, if the suit arose out of or is connected with such business. *State Ins. Co. v. Granger*, 62 Iowa 272, 17 N. W. 504; *Winney v. Sandwich Mfg. Co. (Iowa)*, 50 N. W. 565; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236; *Centennial Mut. Life Ass'n v. Walker*, 50 Iowa 75; *Locke v. Chicago Chronicle Co.*, 107 Iowa 390, 78 N. W. 49; *State Ins. Co. v. Waterhouse*, 78 Iowa 674, 43 N. W. 611; *Sievers v. Dalles, etc., Nav. Co.*, 24 Wash. 302, 64 Pac. 539.

Service of Notice upon Agent, in Action Growing Out of Business of Another and Former Agent—Offices in Same Town.—Section 2613 of the Code of Iowa provides that "where a corporation * * * has, for the transportation of any business, an office or agency in any county other than that in which the principal resides, service may be made upon any agent or clerk employed in such office or agency, in all actions growing out of, or connected with, the business of such office or agency." It was held that this statute does not warrant the service of the notice upon one agent, in an action growing out of the business of another and former agent, who conducted a different office in the same town; and that a notice so served did not give the court jurisdiction over the principal. *State Ins. Co. v. Granger*, 62 Iowa 272, 17 N. W. 504.

Election of Railroad's Steamboat—Action for Ejection from Train.—In *Carrroll v. New York, etc., R. Co.*, 65 N. J. L. 124, 46 Atl. 708, it is held that a person employed by defendant railroad as an engi-

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neer on its steamboat used in transporting cars between Jersey City and the Harlem river, does not represent defendant in such sense as to legalize service on him of summons in an action brought against defendant to recover damages for injuries sustained by plaintiff in being ejected from defendant's train running between New Haven and New York.

26. Directors at Common Law.

At common law a corporation will be bound by service of process upon its directors, only where it is served upon them when they are assembled as a body. *Carnaghan v. Exporter, etc., Oil Co.* (N. Y. Sup. Ct.), 11 N. Y. Supp. 172; *Alabama, etc., R. Co. v. Burns*, 43 Ala. 169.

27. Directors under Statutes.

Some statutes, however, make process against a corporation when served upon its individual directors efficient to bring the corporation into court. *Boyd v. Chesapeake & Ohio Canal Co.*, 17 Md. 195; *St. Louis, etc., Co. v. Edwards*, 103 Ill. 472; *Commissions v. Wilmington, etc., R. Co.*, 2 Pearson (Pa.), 408.

Manager or Director—Synonymous Terms.—Under the Pa. Acts of March 15, 1847, P. L. 261, the words "manager" or "director" are synonymous, and mean one of the body of persons appointed pursuant to the charter or by-laws of the corporation to manage its affairs. *Dale v. Blue Mountain Mfg. Co.*, 167 Pa. St. 402, 31 Atl. 633.

Not Director Appointed by Bank Authorities.—In *Webb v. President & Directors of the Bank of Cape Fear*, 50 N. Car. 288, it is held that the service of process authorized to be made on a director of a corporation, under 24th section of N. Car. Rev. Code, as applied to the Bank of Cape Fear means one of its principal directors, annually elected by its stockholders, and not a director appointed by the authorities of the bank for its branches or agencies.

28. Stockholders.

A stockholder is not so identified with his corporation as to render him a proper person to accept service in an action against it. *De Wolf v. Mallet*, 3 Dana (Ky.), 214; *Bache v. Nashville Horticultural Soc.*, 78 Tenn. 436; *Lillard v. Porter*, 39 Tenn. 177.

Stockholders are distinct parties from the corporation, and service of process on them does not make the corporation a party. *Bache v. Nashville Horticultural Society*, 78 Tenn. 436.

Domestic Corporation Not Agent of Foreign Railroad, Its Majority Stockholder.—In *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247, 27 Sup. Ct. Rep. 513, it is held that the ownership by a foreign railroad corporation of the controlling interest in the stock of a domestic railroad corporation which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals,

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does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation.

29. Incorporators.

Service of process against a corporation upon its individual incorporators will not bring it into court. *De Wolf v. Mallett*, 3 Dana. (Ky.), 214; *Nelson, etc., Co. v. E. Rehkopf & Sons* (Ky.), 75 S. W. 203.

30. Secretary or Treasurer.

Even at common law, service upon its secretary or treasurer, in the absence of its other chief officers, will bind the corporation.

United States.—*Denver, etc., R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595.

Alabama.—*Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

California.—*Kennedy v. Hibernia, Sav., etc., Soc.*, 38 Cal. 151.

Indiana.—*Supreme Council of the Catholic Benevolent Legion v. Boyle*, 15 Ind. App. 342, 44 N. E. 56.

Kansas.—*Chambers Bros. & Co. v. King, etc., Manufactory*, 16 Kan. 270.

Mississippi.—*Southern Express Co. v. Craft*, 43 Miss. 508.

Nebraska.—*McMurty v. Tuttle*, 13 Neb. 232, 13 N. W. 213.

Nevada.—*Gillig Mott. & Co. v. Independent Gold & Silver Mining Co.* 1 Nev. 247.

New Jersey.—*Pennsylvania R. Co. v. Bennett*, 47 N. J. L. 275.

New York.—*Southwestern Mut. Benefit Ass'n v. Swenson*, 49 Kan. 449, 30 Pac. 405; *Miller v. Jones*, 67 Hun 281, 22 N. Y. Supp. 86.

Contra.—See *Watson v. Circuit Judge*, 24 Mich. 38.

Action against Supreme Lodge of Benefit Society—Service on Officer of Council.—Service on the president, secretary and treasurer of a council of a benefit society, when no other or higher officers thereof can be found in the county, is sufficient to give jurisdiction over the supreme lodge. *Supreme Council of the Catholic Benevolent Legion v. Boyle*, 15 Ind. App. 342, 44 N. E. 56.

Secretary Visiting County of Contract.—In *Dick & Whitla v. Meadsville Ry. Co.* 7 Pa. Dist. 350, it is held that in a suit against a corporation, service of summons upon the secretary of the company while he is temporarily visiting in another county, but wherein the contract upon which the action is based was made and performed, is valid.

Assistant Secretary.—It was shown that while the secretary of the defendant railroad did not reside in the state, an assistant secretary did. It was held that service of summons on the latter was good, he being its "secretary" within section 65 of the civil code of Kansas. *Leavenworth, etc., Ry. Co. v. Stone*, 60 Kan. 57, 55 Pac. 346. See also *Colorado Debenture Corp. v. Lombard*, 66 Kan. 251, 71 Pac. 584.

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Secretary—Mere Agent.—But under the statute in question, service of the declaration and notice upon the secretary of a defendant corporation is not service upon it personally, such mode of service impliedly excluding service on a mere agent. *Laufman & Co. v. Hope Mfg. Co.* 54 N. J. L. 70, 23 Atl. 305.

Upon Assistant Treasurer—Non-Resident Treasurer.—In *Winslow v. Staten Island, etc.*, R. Co. 51 Hun 298, 4 N. Y. Supp. 169, it is held that the fact that the treasurer of a defendant domestic corporation was a non-resident and occupied another office, and there performed the duties of treasurer, did not authorize service of summons upon defendant upon its assistant treasurer, who was designated, in section 431 of the New York Code of Civil Procedure as one of the persons upon whom such service could be made.

31. Cashier.

The cashier for a corporation is one of the persons named by some statutes as a proper person to accept service of process for the corporation. *Denver, etc.*, R. Co. *v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *Kennedy v. Hibernia, Sav., etc., Soc.*, 38 Cal. 151; *Reynolds v. Smith*, 18 D. C. 27; *Pennsylvania R. Co. v. Bennett*, 47 N. J. L. 275; *Merriwether v. Bank of Hamburg*, Dud. L. (S. Car.), 36; *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

Alabama Statute.—A summons to a corporation may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier or managing agent thereof, under Ala. Rev. Code, § 2568. *Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

Mere Authority to Sell Newspapers in One Department and Collect Price.—A person who has no connection with a corporation, except to receive the price of papers sold by him for it in one of its departments, is not its cashier within the meaning of a statute allowing personal service of summons to be made upon a domestic corporation by delivering a copy thereof to its cashier; the cashier of a corporation being its financial agent and one who has the right to the charge of its funds to the exclusion of every other person. *Eisenhofer v. New Yorker Zeitung Pub. Co.*, 91 N. Y. App. Div. 94, 86 N. Y. Supp. 438.

Employee in Office of Local Agent of Express Company.—A mere employee in the office of a local agent of an express company is not a cashier of the company, within the meaning of a statute authorizing service to be made on the "cashier or treasurer" of a corporation. *Fearing v. Glenn* (C. C. A.), 73 Fed. Rep. 116.

32. Independent Contractors.

An independent contractor is not such an agent of the corporation employing him that valid process against it may be served through him. *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123.

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33. Traveling Salesmen.

It is generally held that a mere "drummer", one selling goods for a corporation on commission, with only the customary authority of such salesmen, is not an agent for the corporation, within the meaning of a statute making service of process upon one of its agent binding upon the corporation. *Temby v. William Brunt Pottery Co.* 127 Ill. App. 44; *Lumber v. Lieberman*, 106 Tenn. 153.

Merely Selling Goods upon Commission.—In *Temby v. William Brunt Pottery Co.*, 127 Ill. App. 44, it is held that a person who sells goods for a corporation upon commission, who pays his own expenses, is master of his own time and movements, and is without authority to fix prices, collect accounts, or transact any other business for the corporation, is not an agent upon whom service of process can be had.

Authority to Solicit Orders for Merchandise on Commission.—But in *Crowley Cook & Co. v. Summer*, 97 Ill. App. 30, it is held that a person appointed by a corporation to solicit orders for consignments of merchandise in which it dealt, and paid by it for his services measured by his success in securing shipments, is an agent within the meaning of the Practice Act of Illinois, and service of process upon him is sufficient service upon the corporation, under such statute.

Traveling Salesman an Agent.—And a traveling salesman is an "agent" of a domestic mercantile corporation, upon whom service of process may be had, under sec. 10468, 3 Mich. Comp. Laws. *Moinet v. Burnham, etc., Co.*, 143 Mich. 489, 106 N. W. 1126; *Ryerson v. Wayne Circuit Judge*, 114 Mich. 352, 72 N. W. 131.

34. May Be on Attorney.

See *Rossner v. New York Museum Ass'n*, 20 Hun 182.

35. Receivers.

It has been held that where the action is against the corporation, service of process upon receivers in charge of its property and affairs will not bind the corporation. *Heath v. Missouri, etc., R. Co.*, 83 Mo. 617; *Cherry v. North, etc., R. Co.*, 59 Ga. 446; *Collins v. Baltimore, etc., R. Co.*, 7 Ohio Dec. 445, 7 N. P. 270.

But in *Grady v. Richmond, etc., R. Co.*, 116 N. Car. 952, 21 S. E. 304, it is held that service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon its president and superintendent. See also *Bockert v. Central Iowa R. Co.*, 82 Iowa 369, 47 N. W. 1026.

36. Receiver's Agents.

When the action is against the receivership for a corporation, process may be served upon an agent of the receiver. *Louisville, etc., R. Co. v. Cauble*, 46 Ind. 277, 6 Am. Ry. Rep. 349.

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37. Officer of Corporation Appointed Its Receiver.

The fact that an officer of a corporation is appointed its receiver does not terminate his relationship to the corporation as an officer; and, in an action against it, service of process can be had upon him as its officer. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623; *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123.

38. Relation of Person Served Must Appear of Record.

In an action against a corporation, the record must show that the person served with the process was the proper officer or agent of the corporation to accept service for it, and that the statute applicable was complied with.

United States.—*Miller v. Norfolk, etc., R. Co.* (C. C.), 41 Fed. Rep. 431.

Alabama.—*Oxford Iron Co. v. Spradley*, 42 Ala. 24; *McCaskey v. Pollock*, 82 Ala. 174, 2 So. 674; *Montgomery, etc., R. Co. v. Hartwell*, 43 Ala. 508; *Southern B. & L. Ass'n v. Hallum*, 59 Ala. 583; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *Wetumpka, etc., R. Co. v. Cole*, 6 Ala. 655.

Arkansas.—*Arkansas, etc., Mfg. Co. v. Haley*, 62 Ark. 144, 34 S. W. 545; *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17.

California.—*Eureka Land, etc., Co. v. California Ins. Co.*, 130 Cal. 153, 62 Pac. 393; *Jackson v. Norton*, 6 Cal. 187; *Mott Iron Works v. West Coast Plumbing Supply Co.*, 113 Cal. 341, 45 Pac. 683.

Colorado.—*White House, etc., Co. v. Powell*, 30 Colo. 397, 70 Pac. 679.

Florida.—*Drew Lumber Co. v. Walter*, 30 So. 244, 45 Fla. 252.

Georgia.—*Hargis v. East Tenn., etc., Ry. Co.*, 90 Ga. 42, 15 S. E. 631; *Holbrook v. Evansville, etc., R. Co.*, 114 Ga. 4; 39 S. E. 938; *Mitchell v. Southwestern R. Co.*, 75 Ga. 398; *Steiner v. Central R. Co.*, 60 Ga. 552; *Stuart Lumber Co. v. Perry*, 117 Ga. 888, 45 S. E. 251.

Illinois.—*Cairo, etc., R. Co. v. Joiner*, 72 Ill. 520; *Crowley, Cook & Co. v. Sumner*, 97 Ill. App. 301; *Electric Co. v. Congdon, etc., Co.*, 111 Ill. 309; *Grand Tower, etc., Co. v. Schirmer*, 64 Ill. 106; *Hinman v. Andrews Opera Co.* 49 Ill. App. 135; *Illinois, etc., Co. v. Kennedy*, 24 Ill. 319; *Illinois Cent. R. Co. v. Pairpont Mfg. Co.*, 55 Ill. App. 231; *Michigan State Ins. Co. v. Abens*, 3 Ill. App. 488; *St. Louis, etc., R. Co. v. Dawson*, 3 Ill. App. 118.

Kansas.—*Colorado Debenture Corp. v. Lombard*, 66 Kan. 251, 71 Pac. 584; *Union Pac. Ry. Co. v. Pillburg*, 29 Kan. 652.

Kentucky.—*Beattyville Coal Co. v. Bamberger, Bloom & Co.'s Assignee* (Ky.), 53 S. W. 31; *Cumberland Co. v. Lewis* (Ky.), 108 S. W. 347; *Nelson, etc., Co. v. E. Rehkopf & Sons* (Ky.), 75 S. W. 203.

Michigan.—*City of Detroit v. Wabash, etc., Ry. Co.* 63 Mich. 712, 30 N. W. 321; *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752; *Merrill v. Montgomery*, 25 Mich. 72; *Talbot v. Minneapolis, etc., Ry. Co.*,

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82 Mich. 66, -45 N. W. 1113; Toledo Ice Co. *v.* Munger, 124 Mich. 4, 82 N. W. 663.

Mississippi.—Southern Express Co. *v.* Hunt, 54 Miss. 664.

Missouri.—Antonelli *v.* Basile, 93 Mo. App. 138; Cloud *v.* Inhabitants of Pierce City, 86 Mo. 357; Dunn *v.* Missouri Pac. Ry. Co., 45 Mo. App. 29; Gates *v.* Tusten, 89 Mo. 13, 14 S. W. 827; Heath *v.* Missouri, etc., Ry. Co., 83 Mo. 617; Hoen *v.* Atlantic, etc., R. Co., 64 Mo. 561; Little Rock Trust Co. *v.* Southern, etc., R. Co., 195 Mo. 669, 93 S. W. 944; Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126; Newcomb *v.* New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Stone *v.* Travelers Ins. Co., 78 Mo. 655; Story *v.* American Cent. Ins. Co., 61 Mo. App. 534.

Ohio.—Fee *v.* Big Sandy Iron Co., 13 Ohio St. 563, approved in 86 O. St. 219.

Oregon.—Willamette, etc., Co. *v.* Williams, 1 Ore. 112.

South Dakota.—Mars *v.* Oro Fino Min. Co., 7 S. Dak. 605, 65 N. W. 19.

Plaintiff's Affidavit or Clerk's Statement—Alabama Statute.—In Southern Express Co. *v.* Carroll, 42 Ala. 437, it is held that to a judgment by default against a corporation, it is requisite that it should appear otherwise than by the sheriff's return, or the clerk's statement, that the person upon whom the summons and complaint were served occupied such relation to the defendant that the defendant could legally be made a party by service on such person. And section 2569, Ala. Rev. Code, does not authorize proof, either by the plaintiff's affidavit or by the clerk's statement, that the person served occupied the relation above described to the defendant.

"Regular" Ticket Agent.—In Tallman *v.* Baltimore, etc., R. Co. (C. C.), 45 Fed. Rep. 156, it is held that under Ohio Rev. St. § 5044, which provides that process against a railroad company may be served upon any "regular" ticket or freight agent thereof, a return that the summons was served upon "a ticket agent or general agent" of the defendant is defective in not showing that the person served was a "regular" ticket agent.

Upon General Solicitor of Railroad Company—"President Not Found in County."—A summons issued against the Illinois Central Railroad Company was returned by the sheriff as follows: "served this writ on the within named defendant, the Illinois Central Railroad Company, by delivering a copy thereof to James Fentress, general solicitor of said company, this fifteenth day of August 1892, the president not found in the county." It was held not sufficient to give the court jurisdiction. Illinois Cent. R. Co. *v.* Pairpoint Mfg. Co., 55 Ill. App. 231.

Federal Courts—Not Found within County—Limitation Applies to District Instead of County.—Va. Code 1887, § 3225, provides that, in an action against a railroad corporation, process may be served on any agent of the corporation when certain of its officers cannot be found in the county where the action is brought. In an action be-

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gun in the federal court, the shipper's return showed that the writ was served on defendant's station agent, and did not state that none of such officers could be found in the judicial district. It was held that the return was insufficient, since in the federal courts the statutory limitation applies to the district, instead of the county. *Miller v. Norfolk, etc., R. Co. (C. C.), 41 Fed. Rep. 431.*

"Managing Agent of the Defendant."—In an action against a corporation, a return by the sheriff on the summons and complaint, that he had executed the same "by delivering a copy to G. A., managing agent of the defendant," is not sufficient to sustain a judgment by default. *Oxford Iron Co. v. Spradley, 42 Ala. 24.*

Absence of Certain Agent from County, but Not from State, Must Be Shown.—The provision in section 1019 of Fla. Rev. St. that service of process upon a corporation may be made by serving the writ upon certain of its agents, in the absence of other designated representatives, is to be construed, when the contrary intent is not clearly expressed, as meaning in the absence of such representatives from the county where the suit was instituted and such service sought; and it need not be shown that they were absent from the state. *Florida, etc., R. Co. v. Luffman, 33 So. 710, 45 Fla. 282.*

Absence of Proof That Former Director Is No Longer in Office.—But in *Alexandria, etc., R. Co. v. Brown, 17 Wall. (U. S.), 445, 21 L. Ed. 675*, where an act of Congress, in case of a suit against a railroad which it had incorporated, authorized service of process "on any director of the company," and it appeared that on a suit brought the marshal made a return of service on J. S. "reputed to be one of the directors of the company," and the record showed that two years before J. S. was in fact one of the directors, it was held sufficient service, in the absence of proof that J. S. was not one of the directors at the time of service.

Upon Vice President—Failure to Find President Not Shown.—Under the provision of the Colorado Code that service upon corporations "shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer or general agent thereof, but if no such officer can be found in the county, service may be had on any stockholder," service upon the vice president is sufficient, even though the return does not show that the president could not be found in the county. *Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506.*

39. Miscellaneous.

Corporations Joined as Defendants—Service on One as Agent of Corporation He Did Not Represent.—Where two corporations originally joined as defendants were separately organized, had different officials, and their interests were dissimilar, service of process on an individual as agent of one of the corporations which he did not represent in any manner, was insufficient to confer jurisdiction over such corporation or the other corporate defendant, which he did

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in fact represent. *International Text-Book Co. v. Heartt* (C. C. A.), 136 Fed. Rep. 129.

Pending Application for Charter—"President."—Where, pending its application for a charter, a summons of garnishment was sued out and served on one as the president of the corporation, it was void. *Bartram, etc., Co. v. Collins Mfg. Co.* 69 Ga. 751.

Elected Three Days after Service.—Service upon one not an officer of a corporation, but who was elected to the office three days after the service, is not valid service upon the corporation. *Harrell v. Mexico Cattle Co.* 73 Tex. 612, 11 S. W. 863.

Agent Not Served in County of Principal Place of Business.—A court has jurisdiction over a domestic corporation by service of process upon an agent, although its principal place of business may be in a different county from that where the agent was served. *Peoria Ins. Co. v. Warren*, 28 Ill. 429.

A Principal Officer—Residence or Office in County Not Essential.—In *Weaver v. Southern Oregon Co.*, 30 Ore. 348, 48 Pac. 167, it is held that service of summons on one of the principal officers of a private corporation at its principal office or place of business gives the court jurisdiction of the corporation, regardless of whether the officer served resided in or had an office in such county.

General Solicitor's Duties—Judicial Notice.—A general solicitor of a corporation is a person not named in the Illinois statute providing for service of process upon corporations, and the court cannot know judicially what his duties are. If he is an agent of the corporation the officers making the service must take the responsibility of saying so. *Illinois Cent. R. Co. v. Pairpoint Mfg. Co.* 55 Ill. App. 230.

In County Where Principal Office or Principal Business.—Under section 267, Colo. Gen. St., for the purpose of serving a summons, a defendant corporation is to be found only in the county where the principal office of the corporation is kept, or its principal business carried on, subject to the exceptions named in the section. *Western Union Tel. Co. v. Conant*, 11 Colo. 111, 17 Pac. 107.

II. FOREIGN CORPORATIONS.

1. Person Designated by Statute.

It is only by virtue of statutory authority that process can be served upon a foreign corporation; and such service must be made upon a person designated by statute as the proper one to accept service under the circumstances.

United States.—In *re Louisville Underwriters*, 134 U. S. 488, 10 S. Ct. 587; *Pennsylvania, etc., Fire Ins. Co. v. Meyer*, 197 U. S. 407, 419, 49 L. Ed. 810.

California.—*Eureka Land, etc., Co. v. Superior Court*, 66 Cal. 311, 5 Pac. 490; *Jackson v. Norton*, 6 Cal. 187.

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Iowa.—Philip *v.* Covenant Mut. Ben. Ass'n, 62 Iowa 633, 17 N. W. 903.

Maine.—Hinkley *v.* Bluehill Granite Co. 16 Me. 370.

Maryland.—Oland *v.* Agricultural Inc. Co. 69 Md. 248.

Massachusetts.—Lewis *v.* Northern Railroad, 139 Mass. 294, 1 N. E. 546.

Michigan.—American Express Co. *v.* Conant, 45 Mich. 642, 8 N. W. 574; Moore *v.* Wayne Circuit Judge, 55 Mich. 84, 20 N. W. 801; Toledo Ice Co. *v.* Munger, 124 Mich. 4, 82 N. W. 663.

Minnesota.—Mikolas *v.* Walker & Sons, 73 Minn. 305, 76 N. W. 36.

Missouri.—Bile *v.* Equitable Fire Ins. Co., 68 Mo. 617; Rapanna Chem. Co. *v.* Greenfield & N. Ry. Co. 59 Mo. App. 6.

Wisconsin.—State *v.* Northwestern, etc., Ass'n, 62 Wis. 174, 22 N. W. 135; State *v.* United States Mut. Accident Ass'n, 67 Wis. 624, 31 N. W. 229.

The statute of California relative to service of process provides that service upon a foreign corporation "doing business and having a managing or business agent or secretary within the state" shall be made by delivering a copy of the process to such agent, cashier, or secretary. The marshal made return upon a subpoena that he had served it upon "H., agent for" a foreign corporation, defendant. An uncontroverted affidavit, presented upon a motion to quash the service, stated that one L., was the managing agent of the defendant in the state. It was held that the service was bad. *Sobrio v. Manhattan Life Ins. Co. (C. C.)*, 72 Fed. Rep. 566.

Action against Railroad—Materials Furnished Subcontractor—General Manager—Immediate Supervision of Section of Road.—In *Rapanno Chem. Co. v. Greenfield & N. Ry. Co.*, 59 Mo. App. 6, it is held that in proceeding to charge a railroad company with personal liability for materials furnished to a subcontractor for the construction of its road, the service on the company of the notice of the claim must be made in the manner prescribed by statute; and service upon its general manager is insufficient unless it appears that he had the immediate supervision of the section of the road on which such materials were used.

Service Accepted by Bookkeeper, Instead of by Agent or Officer of Foreign Corporation.—A statute of Virginia (Code, § 1105) provides that, where a foreign corporation doing business in the state fails to comply with the requirement to designate an agent upon whom process may be served, service upon either the officers, agents or employees of the company shall be deemed a sufficient service on the company, but the statutes of the state nowhere provide for the acquiring of jurisdiction over a foreign corporation by acceptance of service by any of its agents or employees. It was held that, to acquire jurisdiction under section 1105 by service upon an agent or employee, its provisions must be strictly followed, and the service made on an officer, and that acceptance of service by a bookkeeper employed by a

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foreign corporation, who represented himself, in the acceptance, as having authority to represent the company, but in fact did not, conferred no jurisdiction on a federal court in Virginia to render a judgment against the company. *New River Min. Co. v. Seeley* (C. C. A.), 120 Fed. Rep. 193.

Attorney Appointed by Corporation in Compliance with Statute—Notice of Garnishment Proceeding.—In *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801, it is held that an attorney appointed by a foreign corporation to receive service of process in “actions upon any liability or indebtedness incurred or contracted” by the company in compliance with How. Stat., § 3723, is not competent to be served with notice of garnishment proceedings.

Not Employed in Any Office or Agency for Corporation in State—Statutory Requirements.—In *Philip v. Covenant Mut. Ben. Ass’n*, 62 Iowa 633, 17 N. W. 903, it appeared that the person upon whom notice was served, for the purpose of obtaining jurisdiction of the defendant foreign corporation, was not employed in any office or agency for it in Iowa (Iowa Code, § 2613), was not appointed agent for it under section 1165 of such Code, and was not employed in the general management of its business, as contemplated by section 2612 of such Code. It was held, therefore, that the court obtained no jurisdiction by such service to render judgment upon default against the corporation.

May Be Resident Agent though without Authority to Do Any Act.—The constitutional provision which prohibits any foreign corporation to do any business in Alabama without having a resident agent and known place of business there, has no reference to the extent of the agent’s authority, but is only intended to provide for the institution of suits and the service of process, and such agent may not be authorized by the corporation to do any act, or to transact any business for the company, and yet be an agent within the meaning of such provision. *Nelms v. Edinburg American Land Mortgage Co.*, 92 Ala. 157, 9 So. 141.

2. Designated by Corporation in Compliance with Statute.

Where a statute of a state required a foreign corporation doing business within the state to designate some one on whom process against it may be served, service on such person will confer jurisdiction over the corporation.

United States.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Knott v. Southern Life Ins. Co.* 2 Woods (C. C.), 479; *Lafayette Ins. Co. v. French*, 18 How. (U. S.), 404, 15 L. Ed. 451; *Stout v. Sioux City, etc., R. Co.*, 3 McCrary (U. S.), 1, 8 Fed. Rep. 794.

Arkansas.—*Arkansas Const. Co. v. Mullins*, 69 Ark. 429, 64 S. W. 225.

Massachusetts.—*Tlayer v. Tyler*, 10 Gray Mass. 164.

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Missouri.—*Swallow v. Duncan & Gregory*, 18 Mo. App. 622.

Pennsylvania.—*Howard v. McKee*, 82 Pa. St. 413.

Vermont.—*Sawyer v. North American Life Ins. Co.* 46 Vt. 697.

Washington.—*Bennett v. Supreme Tent, etc. Co.* 40 Wash. 431, 82 Pac. 744.

Transitory Action by Servant for Personal Injuries Sustained in Another State.—Pierce's Code Wash. § 7216, prescribing the conditions under which a foreign corporation may do business within the state, required it to have a resident agent authorized to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within the state of Washington, to which such corporation may be a party. The statute also required the corporation to keep continually some resident agent empowered as aforesaid, and declared the service of process on him shall constitute service on the corporation. It was held that such statute only authorizes service on the agent of a foreign corporation in actions arising within the state, and does not justify such service in a transitory action by a servant for personal injuries occurring in another state. *Olson v. Buffalo Hump Min. Co. (C. C.)*, 130 Fed. Rep. 1017.

Person Designated by Corporation under Existing Statute, but Service Made after Adoption of California Code.—Service of summons on a person designated by a foreign corporation as one upon whom process might be served, under the act of April 1, 1872, is a sufficient service on the corporation, so long as such designation remains unrevoked, although the service was made after the adoption of the Code of Civil Procedure, and on a person who was neither the agent, cashier, secretary, or other officer of the corporation. *Eureka Land, etc., Co. v. Superior Court*, 66 Cal. 311, 5 Pac. 490.

3. Statutory Designation Not Exclusive.

In some states it is held that such statutory provisions are not exclusive, and that process may be made upon any other person authorized by statute to accept service for the corporation. *Thomas v. Placerville, etc., Co.* 65 Cal. 600, 4 Pac. 641; *Howard v. Prudential Ins. Co.*, 1 N. Y. App. Div. 135, 37 N. Y. Supp. 832; *Silver v. Western Assur. Co.* 3 N. Y. App. Div. 572, 38 N. Y. Supp. 335.

4. Authority to Appoint Own Substitute.

It has been held that the person named by a foreign corporation as the one upon whom service may be made has implied authority to designate a substitute; and that the corporation will be bound if process is served upon such deputy. *South Pub. Co. v. Fire Ass'n*, 67 Hun 41, 21 N. Y. Supp. 675.

5. No Property or Business within State.

It has been held that in determining whether a foreign corporation may be brought into court and upon whom process against

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it may be served, whether or not it has property in the state, or is doing business therein, may be material factors.

United States.—Case *v. Smith, etc.*, Co. 152 Fed. Rep. 730; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Connecticut Mut. Life Ins. Co. v. Sprately*, 172 U. S. 602, 43 L. Ed. 569; *Doe v. Springfield, etc., Mfg. Co. (C. C. A.)*, 104 Fed. Rep. 684; *M'Guire v. Great Northern Ry. Co. (C. C.)*, 155 Fed. Rep. 230; *Martin v. New Trinidad Lake Asphalt Co. (C. C.)*, 130 Fed. Rep. 394; *Mecke v. Valley Town Mineral Co. (C. C.)*, 89 Fed. 114; *Peterson v. Chicago, etc., Ry. Co.*, 205 U. S. 364, 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247, 27 Sup. Ct. Rep. 513; *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959; *United States v. American Bell Telephone Co. (C. C.)*, 27 Fed. Rep. 17.

District of Columbia.—*Dallas v. Atlantic, etc., Ry. Co. (D. C.)*, 2 MacArthur, 146; *Weymouth v. Washington, etc., R. Co. (D. C.)*, 1 MacArthur, 19.

Illinois.—*Hannibal, etc., R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Mineral Point R. Co. v. Keep*, 22 Ill. 9.

Maryland.—*Crook v. Girard Iron Co.*, 87 Md. 138, 39 Atl. 94.

New York.—*Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191; *Bates v. New Orleans, etc., R. Co.*, 4 Abb. Pr. N. Y. 72, 13 How. Pr. 516; *Fontana v. Post Printing, etc., Co.*, 87 N. Y. App. Div. 233, 84 N. Y. Supp. 308; *Tuchband v. Chicago, etc., R. Co.*, 16 N. Y. Civ. Proc. 241, 5 N. Y. Supp. 493.

North Carolina.—*Crenningham v. Southern Express Co.*, 67 N. Car. 425.

Oregon.—*Aldrich v. Anchor Coal Co.*, 24 Ore. 32, 32 Pac. 756.

South Carolina.—*Glaize v. South Carolina R. Co.*, 1 Strob. (S. Car.), 70; *Hester v. Rasin Fertilizer Co.*, 33 S. Car. 609, 12 S. E. 563; *Littlejohn v. Southern Ry. Co.*, 45 S. Car. 96, 22 S. E. 761.

South Dakota.—*Foster v. Betcher Lumber Co.* 5 S. Dak. 57, 58 N. W. 9.

Tennessee.—*Peters v. Neely*, 84 Tenn. 275.

Wisconsin.—*Brauser v. New England Fire Ins. Co.* 21 Wis. 506.

Action against Newspaper Company—Agent—Correspondent—Telegraph Company Renting Its Wires.—In *Evansville Courier Co. v. United Press (C. C.)*, 74 Fed. Rep. 918, it is held that New York corporation, engaged in the collection and distribution of news, and which has no officers or place of business in Indiana, cannot be subjected to the jurisdiction of a court within the latter state by service of process either upon a person who occasionally forwards news to it, at so much a word, having no other connection with the corporation, or upon the general manager in Indiana of a telegraph company, from which such corporation rents wires for the transmission of news; neither of such persons being a general or special agent of the corporation, within the Indiana statute.

Not Doing Business in State—Constructive Service under State Statute.—Constructive service on a foreign corporation under a state

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law applicable to corporations doing business in the state will not confer jurisdiction, where at the time of such service the corporation is not doing business in the state. *Cady v. Associated Colonies* (C. C.), 119 Fed. Rep. 420.

No Business Nor Officers within State.—A court does not acquire jurisdiction of a foreign corporation by service of summons on its officers or directors in a state where it is not doing business and has no officers. *Martin v. New Trinidad Lake Asphalt Co.* (C. C.), 130 Fed. Rep. 394.

Place of Business within District of Columbia—Agent for Local Business.—Under section 790, Rev. St., relating to the District of Columbia, an action can be brought in the Supreme Court of the District of Columbia against a foreign corporation only when it has an established place of business in the District, and the process can be served upon the agent or other person by it employed to conduct such business as it is engaged in within the District. *Dallas v. Atlantic, etc., Ry. Co.* (D. C.), 2 MacArth. 146.

Federal Courts—Application of New York Statute.—In *Union Associated Press v. Times Printing Co.* (C. C.), 83 Fed. Rep. 822, it is held that the New York statute providing that service of process upon a foreign corporation can be affected by serving a resident managing agent only when the corporation has property in the state, applies to a service of process by a federal court sitting in the state.

Resident Plaintiff, or Property within State—General or Managing Agent.—In *Cunningham v. Southern Express Co.* 67 N. Car. 425, it is held that in an action against a foreign corporation, where the plaintiff resides in North Carolina, or when the corporation has property in the State, or when the cause of action arose therein, service of a copy of the summons upon its general or managing agent is sufficient, but where neither one of the above conditions exists, service must be made upon some one of its principal officers.

Office of Bank in Foreign State Occupied While Settling up Affairs—President and Vice President Connected with Bank.—In *American Locomotive Co. v. Diskson Mfg. Co.* (C. C.), 117 Fed. Rep. 972, it appeared that a Pennsylvania corporation whose plant and principal place of business were in that state also maintained an office in New York while engaged in active business. It sold its plant and business and gave up its New York office, but the business of settling up its affairs was principally conducted thereafter at the office of a banking firm in New York, of which its president and vice president were members, and where its bank account was kept. It was held that service of summons in an action against the corporation in New York, made on such officers at their New York office, was valid, under N. Y. Code Civ. Proc. § 432.

Place of Business, or Making Contracts within State.—It is competent for a State legislature to authorize the commencement of

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suits by the service of process upon the president, secretary, or treasurer of a foreign corporation having a place of business, or making contracts within such state. *Weymouth v. Washington, etc., R. Co.* (D. C.), 1 MacArth. 19.

President's Residence and Office in State.—Where the president of a foreign railroad corporation was resident in the state, and had an office therein, in which he performed his duties as such president, the service in an action against the corporation arising without the state by complainant residing in the state was properly made upon such president. *Revans v. Southern, etc., R. Co.* (C. C.), 114 Fed. Rep. 982.

Office and All of Its Representatives in New York.—In *Hunter v. International Ry. Imp. Co.* (C. C.), 26 Fed. Rep. 299, it is held that if a Colorado corporation, has an office in the city of New York, and nowhere else, and all the persons competent to represent it be also in New York, service of process may be made upon its agents in that city.

Officers, Business, Property, etc., within State—Agents in State.—Under a certain statute, if foreign railroad companies have their offices and officers, do business and have agents and property in Illinois, service of process may be made upon such agents in the State, in the same manner that it may be made on domestic corporations. *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *Hannibal, etc., R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581.

Agent for Business in State.—Under the statutes of Pennsylvania a foreign corporation which transacts business in that state through its authorized agents is amenable to suit there, and service of process upon such agents is good service upon it. *Hussey Mfg. Co. v. Deering* (C. C.), 20 Fed. Rep. 795.

Resident President with Office within State.—Where the president of a foreign corporation resides within the state of New York and maintains an office therein, from which he manages and controls its business, service of a summons upon the corporation by the delivery of a copy thereof to its president within New York is valid. *Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191.

Contracts or Transactions within State Only—Resident Agent—Implied Assent to Jurisdiction.—In *Peters v. Neely*, 84 Tenn. 275, it is held* that the general rule is that the jurisdiction of Tennessee courts over a foreign corporation, by service of process on a resident agent, is limited to cases founded upon contracts made or transactions occurring in Tennessee, but a foreign corporation doing business in the state, under the express authority of its charter, at a place where its principal officers, and all, or nearly all, of its stockholders reside, and where directors hold their meetings, must be considered as consenting to the jurisdiction of the local courts for all purposes, at any rate until it shows cause to the contrary.

On Insurance Commissioner after Ceasing to Do Business in State.—In *Friedman v. Empire Life Ins. Co.* (C. C.), 101 Fed. Rep. 535, it

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is held that a resolution adopted by the directors of an insurance company of another state, on its being authorized to do business in Kentucky, in accordance with Act Ky. April 5, 1893, providing that, before authority is granted to any foreign insurance company to do business in the state, it must file with the insurance commissioner a resolution of its board of directors, consenting that service of process on any agent of the company in the state or on the state commissioner of insurance, in any action brought or pending in this state, shall be valid service upon said company, though such resolution is not limited by its terms as to time, and has never been repealed, cannot be held to confer authority to make service on the insurance commissioner, by force of the statute, after the company has ceased to do business in the state, and has withdrawn all its agents therefrom.

6. Failure of Corporation to Designate.

When a foreign corporation does business within a state without complying with statutory requirements as to appointing a representative to accept service for it, it will be bound if some other proper officer or agent is served. *Wheeler v. New York, etc., R. Co.*, 24 Barb. (N. Y.), 414; *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534; *Pollock v. Carolina, etc., Loan Ass'n*, 48 S. Car. 65, 25 S. E. 977; *Foster v. Belcher Lumber Co.*, 5 S. Dak. 57, 58 N. W. 9.

Failure of Insurance Company to Appoint Agent—Agent for State Business.—In *Funk v. Anglo-American Ins. Co. (C. C.)*, 27 Fed. Rep. 336, it is held that where a foreign insurance company does business in Missouri through an agent, without complying with the requirements of the statutes of the state as to the appointment of an agent to receive service, process may be served in suits against it upon the agent through whom it transacted its business in the state.

Agent Other than the One for Transaction in Question.—Acts La. 1890, No. 149, requires a foreign corporation doing business in the state to file a declaration with the secretary of state, in which an agent shall be designated upon whom process can be served. It further provides that any corporation doing business in the state without complying with such requirement may be sued on any cause of action in the parish where the cause arose, "and the service of process may be upon the person, firm or company acting or transacting such business for said corporation, and each person or persons, company or firm, shall be deemed the agent of said corporation upon whom service can be made." It was held that a state court of a parish in which a transaction with such a corporation, which had not filed the required declaration, occurred, had jurisdiction of a suit growing out of such transaction, although service was made upon an agent other than the one who acted for the corporation in the transaction. *Blanchard v. Sonnefield (C. C. A.)*, 116 Fed. Rep. 257.

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Presumption of Compliance with Statute—Refusal of Insurance Commissioner to Receive Summons.—In *Kapp, etc., Co. v. National Mut. Fire Ins. Co. (C. C.)*, 30 Fed. 607, it is held that in Missouri, where a foreign insurance company is prohibited from carrying on business until it has filed with the insurance commissioner a certificate stipulating that service of process may be made upon him, where it is alleged in the petition that a foreign insurance company is doing business in the state, it will be presumed that it has complied with the law, and default will be entered upon service upon the commissioner, though he has refused to receive the summons.

7. President or Other Chief Officer.

Process served upon its president or other chief officer will bind a foreign corporation, under most of the statutes on the subject. *National Bank v. Southern, etc., Co.*, 55 Ga. 36; *Epstein v. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488; *Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191; *Jester v. Baltimore Steam Packet Co.*, 131 N. Car. 54, 42 S. E. 447; *Peters v. Neely*, 84 Tenn. 275.

On President Prima Facie Sufficient.—In *Farrell v. Oregon Gold Min. Co.*, 31 Ore. 463, 49 Pac. 876, it is held that as there is no special law in Oregon relative to service of process upon a foreign corporation, service upon its president is prima facie sufficient, under section 55, Hill's Ann. Laws, though the return does not show he was authorized to represent the corporation.

Upon Vice President or Stockholder—No Agent in County—Burden of Proof.—That portion of the opinion in *Venner v. Denver Union Water Co.*, 15 Colo. App. 495, holding that service cannot be made upon the vice president of a foreign corporation, nor upon a stockholder, unless it is shown that there is no agent within the county, is overruled. *Venner v. Denver Union Water Co.* 40 Colo. 212, 90 Pac. 623.

Attachment of Its Property Essential—Mere Service by Subpoena upon Treasurer.—In Massachusetts a foreign corporation, unless jurisdiction over it is given by statute, or unless it voluntarily appears, cannot be sued at law, except by means of an attachment of its property, therefore, the court had no jurisdiction over defendant where the only service was by subpoena upon its treasurer. *Desper v. Continental Water Meter Co.* 137 Mass. 252.

"A Usual Place of Business" within State—Service upon Treasurer.—A foreign railroad company, which has an office in Massachusetts for the convenience of its stockholders and for the better management of its finances and other business, where its principal officers are to be found and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, has a usual place of business in Massachusetts, within the meaning of Mass. St. 1870, c. 194, and may be summoned as

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trustee by process served upon its treasurer. *National Bank of Commerce v. Huntington*, 129 Mass. 444.

Assistant Secretary.—And it has been held that in the absence of the secretary and other chief officers, service upon its assistant secretary will confer jurisdiction over the corporation.

8. Managing Agent.

Such statutes generally designate the managing agent of a foreign corporation as one through whom process may be served upon the corporation.

Alabama.—*Western Union Telegraph Co. v. Pleasants*, 46 Ala. 641.

California.—*Thomas v. Placerville, etc., Co.*, 65 Cal. 600, 4 Pac. 641.

Kentucky.—*Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332.

Missouri.—*McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

Montana.—*King v. National, etc., Co.*, 4 Mont. 1, 1 Pac. 727.

Nebraska.—*Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537, 68 N. W. 929; *Klopp v. Creston City etc., Co.*, 34 Neb. 808, 52 N. W. 819; *Ord Hardware Co. v. Case, etc., Mach. Co.*, 77 Neb. 847, 110 N. W. 551.

New York.—*Coler v. Pittsburg Bridge Co.* 146 N. Y. 281, 40 N. E. 779; *Evans v. American Steel Foundry Co.*, 30 N. Y. Misc. 806, 61 N. Y. Supp. 922; *Howard v. Prudential Ins. Co.*, 1 N. Y. App. Div. 135, 37 N. Y. Supp. 832; *Ives v. Metropolitan Life Ins. Co.*, 78 Hun 32, 28 N. Y. Supp. 1030; *Kieley v. Central, etc., Mfg. Co.*, 13 N. Y. Misc. 85, 34 N. Y. Supp. 106; *Palmer v. Chicago Evening Post Co.*, 85 Hun 403, 32 N. Y. Supp. 992; *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.), 368; *Perrine v. Ransom Gas Mach. Co.*, 60 N. Y. App. Div. 32, 69 N. Y. Supp. 698; *Taylor v. Granite State, etc., Ass'n*, 47 N. Y. St. R. 882, 20 N. Y. Supp. 135; *Vitolo v. Bee Pub. Co.* 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273.

North Carolina.—*Cunningham v. Southern Express Co.*, 67 N. Car. 425.

North Dakota.—*Brown v. Chicago, etc., Ry. Co.*, 12 N. Dak. 61, 95 N. W. 153.

South Dakota.—*Foster v. Betcher Lumber Co.*, 5 S. Dak. 57, 58 N. W. 9.

Wisconsin.—*Upper Mississippi Transp. Co. v. Whitaker*, 16 Wis. 220.

Cause of Action Accrued within State.—A foreign corporation doing business in Alabama through a managing agent or employee may be sued by summons and complaint served on such agent or employee, upon a cause of action which accrued within the state. *Western Union Tel. Co. v. Pleasants*, 46 Ala. 641.

Soliciting Agent of Foreign Railroad Company.—A manager of an agency established in Nebraska by a foreign railroad corporation for the purpose of soliciting traffic over its line of road is a "manag-

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ing agent," within the statute of Nebraska providing for service of summons upon such corporations. *Fremont, etc., Co. v. New York, etc., R. Co.*, 66 Neb. 159, 5 R. R. R. 470, 28 Am. & Eng. R. Cas., N. S., 470, 92 N. W. 131.

Manager.—A manager of a foreign corporation having no property in the State of New York, whose letter heads designate him as its "Manager," and who signs letters in New York as its "Manager," is a "managing agent in the State of New York within subdiv. 3 of § 432 of the New York Code of Civil Procedure, relating to service of process upon foreign corporations.

"Found" within District—Agent Soliciting Advertisements.—An Illinois corporation, publishing a newspaper in Chicago, had continuously in New York an agent who solicited advertisements for such newspaper, and had authority to contract for the publication thereof at regular rates, the making of such contracts being a substantial part of the corporate business. It was held that the corporation impliedly assented to be found in New York, and summons might be served upon it by service upon such agent, he being a "managing agent," within the meaning of N. Y. Code Civ. Proc. § 432. *Palmer v. Chicago Herald Co. (C. C.)*, 70 Fed. Rep. 886.

Failure to Designate Any Person.—When a foreign corporation doing business in California has not designated a person upon whom service of summons may be made, as required by statute, it may be made upon its managing agent. *Thomas v. Placerville, etc., Co.*, 65 Cal. 600, 4 Pac. 641.

Probability of Corporation Being Notified of Service.—The test whether a person is a "managing agent" of a foreign corporation, within the meaning of § 432 of the New York Code of Civil Procedure, permitting service of process upon such agents, is not whether the agent is subject to the control of the directors of the corporation, nor is it necessary that the person served should be its managing agent in the state of New York, but he should be of sufficient responsibility to render it probable that the corporation will receive notice of the service if it be made upon him. *Coler v. Pittsburgh Bridge Co.*, 84 Hun 285, 32 N. Y. Supp. 439.

Agent to Solicit Advertisements—Office with Name of Newspaper on Windows.—In *Brewer v. George Knapp & Co. (C. C.)*, 82 Fed. Rep. 694, it is held that an agent of a foreign newspaper corporation, who is empowered to solicit advertisements, make contracts therefor, and receive payment, and who carries on the business at an office having the name of the newspaper on its windows, is a "managing agent," through whom the corporation may be served with process, under N. Y. Code Civ. Proc. § 432. But this decision is reversed in *Union Associated Press v. Times-Star Co. (C. C.)*, 84 Fed. Rep. 419.

Local Agent of Foreign Insurance Company.—An authorized agent of a foreign insurance company located in Missouri is a chief

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or managing officer thereof within the meaning of the twenty-sixth section of the first article of the attachment act of Missouri, *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

Railroad System Formed—Business for Foreign Company Solicited through Manager of Domestic Company.—In *Norton v. Atchison, etc., R. Co. (C. C.)*, 61 Fed. Rep. 618, it is held that a foreign railroad company which runs its trains over the tracks of other companies forming with it a "system" or "route" into California, and there solicits and obtains freight and passenger business through the general manager of one of the subordinate companies and his assistants, may be legally served with process by service upon him, as the "managing and business agent" in the state of such foreign company, although it has never directly designated him as its agent.

Failure to Designate Person and Absence of Officers Specified by Statute—Burden of Proof.—In *Vitolo v. Bee Pub. Co.*, 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273, it is held that it is a condition precedent to a valid service of a summons upon the managing agent of a foreign corporation within the state of New York, under subdivision 3 of § 432 of the Code of Civil Procedure, for the plaintiff to show that the corporation has failed to designate a person upon whom service can be made, and that neither of the officers specified in subdiv. 1 of such section can be found within the state.

9. Authority Limited to One Act.

But one is not a managing agent for a foreign corporation if his authority to act for it is limited to one act or transaction. *Palmer v. Chicago Evening Post Co.*, 85 Hun 403, 32 N. Y. Supp. 992; *Taylor v. Granite State, etc., Ass'n*, 136 N. Y. 343, 32 N. E. 992.

10. Local Agent.

Some statutes provide for service upon a "local agent" of a foreign corporation. *Jones v. Hartford Ins. Co.*, 88 N. Car. 499; *American Express Co. v. Johnson*, 17 Ohio St. 641; *Frick Co. v. Wright*, 23 Tex. Civ. App. 340, 55 S. W. 608; *Pacific Mut. Life Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Western, etc., Organ Co. v. Anderson*, 97 Tex. 432, 79 S. W. 516.

Agent for State.—In *Western, etc., Organ Co. v. Anderson*, 97 Tex. 432, 79 S. W. 516, it is held the phrase "any local agent" means an agent at a given place or within a definite district; and one who is the agent for a foreign corporation for the state of Texas was not such an agent as is meant by Tex. Rev. St. 1895, art. 1223.

Goods Sold Only to "Distributing Agents"—Agreement as to Rebates.—A nonresident corporation sold its goods only to certain persons in each state, whom, in its circulars, it styled "distributing agents," under an agreement whereby each of the latter was to buy exclusively from it, and to sell at trade prices prescribed by it. On complying with these conditions for a certain time, the "agent" was to become entitled to a certain rebate, and also to have authority to

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issue to his wholesale customers certificates binding the corporation to pay a rebate directly to them, provided they continued for a given time to purchase from him exclusively. He sustained no other relation to the company, and the goods purchased by him were absolutely his own. It was held that he was not the agent of the corporation, within the meaning of Md. Code art. 23, §§ 295, 296, authorizing service of process against foreign corporations upon their agents or attorneys. *Gottschalk Co. v. Distilling, etc., Feeding Co. (C. C.)*, 50 Fed. Rep. 681.

Express Company—Garnishment—Local Agent—Residence of President—Absence of Proof.—After judgment against a foreign express company upon a summons of garnishment served upon its local agent alone, the service will be held sufficient until the judgment is set aside, unless it affirmatively appears that its president resided in Georgia at the time of such service. *Southern Exp. Co. v. Skipper*, 85 Ga. 565, 11 S. E. 871.

11. Mere Transient Agent Not "Local Agent."

Under such statutes, a "local agent" is not a mere transient one, but he must have a permanent or temporary residence within the state. *Moore & Falk v. The Freeman's Nat. Bank*, 92 N. Car. 590; *Chicago, etc., R. Co. v. Walker*, 16 Am. & Eng. R. Cas., 553, 9 Lea (77 Tenn.), 475.

Mere Transient Agent.—A local agent of a foreign corporation, upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in North Carolina for the purpose of his agency, and does not include a mere transient agent. *Moore & Falk v. Freeman's Nat. Bank*, 92 N. Car. 590.

Agent—Local Agent—Definition—Attorney.—In *Bay City Iron Works v. Reeves & Co.*, 43 Tex. Civ. App. 254, 95 S. W. 739, it is held that by agent or representative as used in § 25 of art. 1194 of Tex. Rev. St., is meant a fixed or permanent agency in the county in which the suit is instituted, and by the term "local agents" used in article 1223 is meant one who serves his principal in a certain, fixed locality; and an attorney at law is not such an agent.

Ceased to Do Business within State—Traveling Auditor.—In *Higgs & Co. v. Sperry*, 139 N. Car. 299, 51 S. E. 1020, it is held that under § 217, of the North Carolina Code, a traveling auditor of a foreign corporation, which had ceased to do business in the state, is not an officer upon whom, process can be served.

Local Agent—Collecting Attorney.—An attorney of a foreign corporation, who has claims to collect for it in North Carolina, is not one of its "local agents" upon whom process can be served in an action against it commenced in the State. *Moore & Falk v. Freeman's Nat. Bank*, 92 N. Car. 590.

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12. Agency Created by Mere Implication.

To bind a foreign corporation by service upon one as its agent, he must be one who actually represents the corporation which appointed him, and his agency must be real and bona fide, and not one created by mere implication, contrary to the intention of those authorized to control the corporate affairs. *United States v. American Bell Tel. Co. (C. C.)*, 29 Fed. Rep. 17; *Schmidlapp & Co. v. La Confrance Ins. Co.*, 71 Ga. 246; *Chicago, etc., R. Co. v. Suta*, 123 Ill. App. 125; *Carroll v. New York, etc., R. Co.*, 65 N. J. L. 124, 46 Atl. 708; *Mikolas v. Walker & Sons*, 73 Minn. 305, 76 N. W. 36; *Wold v. Colt*, 102 Minn. 386, 114 N. W. 243.

Agency Created by Implication, Contrary to Intention of Parties.—In *Chicago, etc., R. Co. v. Suta*, 123 Ill. App. 125, it is held that while an agency relation may in some cases arise or be established as a legal result from the facts, although contrary to the avowed intention of the parties, no such rule can have any application to cases where it is sought to reach foreign corporations by service of summons on a local agent. Such agent must be one actually appointed by and representing the corporation as a matter of fact, not one created by implication, contrary to the intention of the parties.

Must Do Substantial Portion of Business in State—Agent by Mere Implication.—In *Doe v. Springfield, etc., Mfg. Co. (C. C. A.)*, 104 Fed. Rep. 684, it is held that under Cal. Code Civ. Proc. § 411, which authorizes service of process upon foreign corporations “doing business and having a managing or business agent, cashier or secretary, within this state,” by service on such agent, cashier or secretary, to render such a service effective, where made on a person as the business agent of a foreign corporation, the corporation must be in fact doing a substantial part of its business within the state, so as to be subject to the statute, and the agent must be one having actual derivative authority bearing a close relation to that of managing agent, cashier, or secretary, and not merely an agency created by construction or implication, contrary to the intention of the parties.

Collection of Single Renewal Premium in Foreign State through Bank Cashier.—The collection by a Pennsylvania insurance company of a single renewal premium through the cashier of a bank in Wisconsin, at the request and for the supposed accommodation of the policy holder, did not make such cashier an agent of the company, representing it in the state, in such sense that service of process upon him could bring the company within the jurisdiction of a court of that state, notwithstanding a state statute by which such agency is attempted to be created. *Frawley v. Pennsylvania Casualty Co. (C. C.)*, 124 Fed. Rep. 259.

13. Agent for Business in Controversy.

It has been held that under some statutes the agent of a foreign corporation through whom process may be served upon his princi-

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pal must be one whose agency includes the business which gave rise to the cause of action. *Angerhoefer v. Bradstreet Co.* (C. C.), 22 Fed. Rep. 305; *Hussey Mfg. Co. v. Deering* (C. C.), 20 Fed. Rep. 795; *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247, 27 Sup. Ct. Rep. 513; *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Carroll v. New York, etc., R. Co.*, 65 N. J. L. 124, 46 Atl. 708.

Service of process on an agent of a foreign corporation doing business within the state, in order to be valid, must be upon an agent representing the corporation with respect to such business. *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247, 27 Sup. Ct. Rep. 513.

Agent in Transaction Out of Which Suit Arose.—Service of process upon the agent of a defendant foreign corporation, who is its agent in the very transaction out of which the suit arises, is sufficient under the statutes of New York. *Estes v. Belford* (C. C.), 22 Fed. Rep. 275.

In County Where Local Agent Conducts Business.—In *Angerhoefer v. Bradstreet Co.* (C. C.), 22 Fed. Rep. 305, it is held that a foreign corporation that carries on business in Texas may be sued in the county where its local agent conducts such business by service on him.

Must Represent Corporation in Contemplated Litigation.—Section 88 of the Corporation Act of New Jersey, declaring that in all personal actions brought against any foreign corporation process may be served upon any officer, director, agent, clerk, or engineer of the corporation, must be construed in the light of the constitutional principle that only by due process of law can courts acquire jurisdiction over parties. Consequently the persons on whom such service can legally be made are only such as may be reasonably supposed to represent the corporation in the litigation contemplated. *Carroll v. New York, etc., R. Co.*, 65 N. J. L. 124, 46 Atl. 708.

14. Any Resident Officer or Agent.

Under some statutes, process against a foreign corporation, doing business in the state, may be made upon any of its officers or agents residing therein. *Barnes v. Western Union Tel. Co.* (C. C.), 120 Fed. Rep. 550; *Hunter v. International Ry. Imp. Co.* (C. C.), 26 Fed. Rep. 299; *City Fire Ins. Co. v. Carrugo*, 41 Ga. 660; *National Bank v. Southern, etc., Co.*, 55 Ga. 36; *Hannibal, etc., R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Midland Pac. Ry. Co. v. McDermid*, 91 Ill. 170; *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *American Bonding Co. v. Dickey*, 74 Kan. 791, 88 Pac. 66; *Reyer v. Odd Fellows' Acci. Ass'n*, 157 Mass. 367, 32 N. E. 469.

15. Agent for State Business.

Some statutes provide that such agent must be one who represents the corporation with respect to the business it does within the

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state. *Boardman v. McClure Co.* (C. C.), 123 Fed. Rep. 614; *Connecticut Mut. Life Ins. Co. v. Sprately*, 172 U. S. 602, 43 L. Ed. 569; *Peterson v. Chicago, etc., Ry. Co.*, 205 U. S. 364, 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247, 27 Sup. Ct. Rep. 513; *Societe Fonciere, etc., v. Milliken*, 135 U. S. 304, 34 L. Ed. 208; *Board of Trade v. Hammon Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111; *Mecke v. Valley Town Mineral Co.* (C. C.), 89 Fed. 114; *Ricketts v. Sun Printing & Pub. Ass'n* (D. C.), 27 App. Cas. 222; *Burgess v. Aultman & Co.*, 80 Wis. 293, 50 N. W. 175.

Agent for Business within State.—In *Boardman v. McClure Co.* (C. C.), 123 Fed. Rep. 614, it is held that under the statutes of Minnesota and the acts of Congress governing service of process upon foreign corporations, the service must be made upon some agent who is transacting the business of the corporation within the state.

Where process is served upon the agent of a foreign corporation, the service must be upon such an agent as represents the corporation with respect to the business which it does within the state. *Central of Georgia Ry. Co. v. Eichberg* (Md.), 27 R. R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356, 68 Atl. 690.

Collects or Remits Premiums Due Foreign Insurance Company.—Any person, who for another than himself, collects or remits premiums due to a foreign insurance company, is its "agent" for purpose of service of process upon the company. *Sadler v. Mobile Life Ins. Co.*, 60 Miss. 391.

Agent within State—Resident Broker.—Ky. Civ. Code Prac. § 51, subsec. 6, provides that service of summons in an action against a nonresident corporation may be made on the agent or manager of such corporation in Kentucky. A company dealing in hides wired to a broker living in Kentucky their prices, and he sold certain hides as the representative of the corporation, forwarding the order to the corporation which accepted it and filled it, the order being subject to their approval. It was held that the broker was the agent of the corporation within such statute. *Nelson, etc., Co. v. E. Rehkopf & Sons* (Ky.), 75 S. W. 203.

Person Conducting Business within District of Columbia.—Under D. C. Code, § 1537, service of process on a foreign corporation doing business in the District of Columbia may be made upon the person conducting such business, whether or not he is technically the agent of the corporation. *Ricketts v. Sun Printing & Pub. Ass'n* (D. C.), 27 App. Cas. 222.

16. Any Agent or Officer Found in State.

Some statutes permit service of process against a foreign corporation to be made upon any of its agents or officers found in the state. *Nelms v. Edinburg-American Land Mortg. Co.*, 92 Ala. 157, 9 So. 141; *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. 93; *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, 50 N. W. 389; *Vorheis v. People's Mut. Ben. Soc.*, 86 Mich. 31, 48 N. W. 1087; *Mc-*

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Nichol v. United States Mercantile Reporting Agency, 74 Mo. 457; *Stone v. Travelers Ins. Co.*, 78 Mo. 655; *Walker Bros. v. Continental Ins. Co.*, 2 Utah, 331; *Sievers v. Dalles, etc., Nav. Co.*, 24 Wash. 302, 64 Pac. 539.

Resident Agent of Mining Corporation.—How. St. § 8086, as amended by Act No. 266, Mich. Laws of 1889, authorizing the service of a writ of garnishment upon any officer or agent of a foreign corporation found within the State, is not confined to a general agent of the corporation, and service made upon the resident agent of a mining corporation, whose duties consisted in acting as custodian of the corporate property in the county where its mining operations were carried on, and in inspecting the work of its contractors in said county, was sufficient. *Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, 50 N. W. 389.

17. Director.

Under some statutes a foreign corporation may be brought into court through service upon one of its directors. *Pennsylvania, etc., Fire Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. Ed. 810; *Childs v. Harris Mfg. Co.*, 104 N. Y. 477, 11 N. E. 50.

Residence of Director and Accrual of Cause of Action in State.—Where a foreign corporation is doing business in New York, service of summons on one of its directors within the state, having his permanent residence in the state, the cause of action having arisen in the state, is valid, under N. Y. Code Civ. Proc. § 432. *Meyer v. Pennsylvania L's Mut. Fire Ins. Co. (C. C.)*, 108 Fed. Rep. 169.

18. Cashier.

And some statutes allow service of process to be made through the cashier of a foreign corporation. *McCulloh v. Paillard, etc., Co.*, 20 N. Y. Civ. Proc. 386.

Cashier—Cash within State.—A person who accepts whatever cash a foreign corporation receives in the state of New York, is its "cashier" within the meaning of section 432 of the Code of Civil Procedure. *McCulloh v. Paillard, etc., Co.*, 20 N. Y. Civ. Proc. 386.

19. Clerk.

And it has been sometimes provided by statute that jurisdiction over a foreign corporation, doing business within the state, may be acquired by service upon it through one of its clerks. *Libbey v. Hodgson*, 9 N. H. 394.

20. Attorney.

It has been held that its attorney does not so represent a foreign corporation, with respect to any other litigation than that he is employed to conduct for the corporation, as to render service of process on him binding on his company. *Safford v. Scottish American*

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Mortg. Co., 98 Ga. 785, 27 S. E. 208; *Moore & Falk v. The Freeman's Nat. Bank*, 92 N. Car. 590.

Agents in State but Not in County—Attorney.—A foreign corporation with agents in Georgia upon whom service can be perfected cannot be subjected to suit in a county in which there is no such agent; and the fact that such corporation is represented in litigation in a state court by an attorney at law does not, without more, show that he is authorized to receive service for the corporation in other litigation than that in which he has appeared as attorney. *Safford v. Scottish American Mort. Co.*, 98 Ga. 785, 27 S. E. 208.

Attorney Making Collections.—In *Moore & Falk v. The Freeman's Nat. Bank*, 92 N. Car. 590, it is held that an attorney for a foreign corporation who has claims to collect for it in North Carolina, is not a local agent in the state upon whom process can be served.

General Counsel.—But in *Clews v. Rockford, etc.*, R. R. 49 How. Pr. (N. Y.), 117 it is held that service of summons in New York on the general solicitor or counsel of a foreign corporation is good service, where the corporation has failed to designate a person residing in the state on whom service of papers could be made, as required by ch. 279 of N. Y. Laws of 1855.

21. Attorney for Defendant.

But it has been held that valid service may be made upon the attorney representing a foreign corporation with respect to the litigation in which it is sought to bring the corporation into court. *Aldrich v. Blatchford & Co.*, 175 Mass. 369, 56 N. E. 700; *Sellers v. Home Fertilizer Chemical Works*, 76 S. Car. 343, 56 S. E. 978.

Notice of Appointment of Receiver—Attorney.—Where a foreign corporation, sued in the supreme court of New York, appears by attorney, a notice of the appointment of a receiver of such corporation, served upon such attorney, is good service. *DeBemer v. Drew*, 57 Barb. (N. Y.), 438.

Action to Set Aside Judgment—Attorney.—In an action by a resident of South Carolina against a foreign corporation to set aside a judgment obtained by it against him, service on the attorney obtaining the judgment, after it was entered, is a good service on such corporation. *Sellers v. Home Fertilizer Chemical Works*, 76 S. Car. 343, 56 S. E. 978.

22. Soliciting Agents and Traveling Salesmen.

It is generally held that one of these is not such an agent of the foreign corporation for the benefit of which he is carrying on his vocation in the state as to render service on him valid as against his employer.

United States.—*Atlas Glass Co. v. Ball Bros. Glass Mfg. Co.* (C. C.), 87 Fed. Rep. 418; *Boardman v. M'Clure Co.* (C. C.), 123 Fed. Rep. 614; *Case v. Smith, etc., Co.*, 152 Fed. Rep. 730; *Doe v. Springfield, etc., Mfg. Co.* (C. C. A.), 104 Fed. Rep. 684; *M'Guire v. Great*

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Northern Ry. Co. (C. C.), 155 Fed. Rep. 230; *Strain v. Chicago Portrait Co.* (C. C.), 126 Fed. Rep. 831; *Wall v. Chesapeake, etc., Ry. Co.* (C. C. A.), 95 Fed. Rep. 398.

New Jersey.—*Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 20 Atl. 760.

New York.—*Frankel v. Dover Mfg. Co.* (N. Y. Sup. Ct.), 104 N. Y. Supp. 459; *Fontana v. Post, etc., Pub. Co.*, 87 N. Y. App. Div. 233, 84 N. Y. Supp. 308; *Hodge v. Acorn Brass Mfg. Co.*, 50 N. Y. Misc. 627, 98 N. Y. Supp. 673; *Vitolo v. Bee Pub. Co.*, 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273.

Pennsylvania.—*Howard v. McKee*, 82 Pa. St. 413; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 423.

Resident Agent for Soliciting Freight for Shipment over Foreign Line.—Summons was served on an agent of a foreign railroad company, who was soliciting, within the state, passenger and freight traffic to be routed over its lines, none of which were in Minnesota. It was held that the company was not "doing business in the state," within the meaning of Minn. Rev. Laws 1905, § 4109, subd. 3, and the service was therefore rightfully set aside. *North Wisconsin Cattle Co. v. Oregon, etc., R. Co.* (Minn.), 30 R. R. R. 55, 53 Am. & Eng. R. Cas., N. S., 55, 117 N. W. 391.

Mere Soliciting Agent of Foreign Railroad—No Property in State.—In *Booz v. Texas, etc., Ry. Co.* (Ill.), 41 R. R. R. 607, 64 Am. & Eng. R. Cas., N. S., 607, it is held that where a foreign corporation had no property or agent authorized to make a contract for or bind it in any way within the state, it was not subject to suit in Illinois by service on a mere soliciting agent.

Agent Soliciting Freight for Foreign Railroad Company for Shipment over Foreign Lines.—A foreign railroad corporation, not owning or operating any railroad in Rhode Island, but employing an agent to solicit in the state freight for ultimate shipment over its lines wholly outside the state, is not doing business within the state within the statute in question, authorizing the service of summons in actions against foreign corporations doing business in the state. *Berger v. Pennsylvania R. Co.* (R. I.), 24 R. R. R. 665, 47 Am. & Eng. R. Cas., N. S., 665, 65 Atl. 261.

Soliciting, through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is not doing business within the eastern district of Pennsylvania, in such a sense that process can be served upon the corporation there. *Green v. Chicago, etc., Ry. Co.* (U. S.), 25 R. R. R. 194, 48 Am. & Eng. R. Cas., N. S., 194.

Passenger Agent with No Fixed Place of Business or Office in Foreign State—"Office or Agency in a County."—In *Chicago, etc., R. Co. v. Walker*, 16 Am. & Eng. R. Cas. 553, 9 Lea (77 Tenn.), 475, it appeared that a railroad company having no office nor any part of its line in Tennessee, employed B. as its agent in the state to induce travelers to take such routes as connected with its line. B. had no

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authority to sell tickets for his principal, and his business, which consisted principally in securing emigrants as patrons for his company, required that he should travel from place to place, see passengers, and aid them in purchasing tickets, and checking baggage on connecting lines, and correspond with persons likely to travel over his principal's line. His presence was frequently required at C., in Tennessee, that place being a railroad center of lines connecting with that of his principal, but he had no office or place of business there. Plaintiff sued B.'s company for breach of a contract made with B., serving process on B., whose want of authority to receive such service was raised by a plea in abatement. It was held that such service was invalid and the plea good, B. having no "office or agency in a county" within the state, within the meaning of the statute in question.

Employee Maintaining Office for Soliciting Business to Be Done in Another State.—In *McGuire v. Great Northern Ry. Co.* (C. C.), 155 Fed. Rep. 230, it is held that a railroad company of another state, neither owning nor operating any line of road in the state of Iowa, cannot be brought within the jurisdiction of a state court therein, either under the rules of the federal courts or the Iowa statutes relating to suits against foreign corporations, by service made upon an employee, not a general agent, maintaining an office in such state for the purpose of soliciting business to be done outside of the state, where the cause of action has no connection with such office or agency.

Soliciting Business for Foreign Railroad Company—No Property or Office within State.—In *Wall v. Chesapeake, etc., Ry. Co.* (C. C. A.), 95 Fed. Rep. 398, it is held that one employed in Chicago to solicit business and give information on behalf of a foreign railroad company having no property or office within the state, who has no power to make contracts for the company, is not an agent on whom service of process against the company can legally be made under the statutes of Illinois.

Agency, Maintained Jointly with Other Railroads, Relating to Through Freight Service.—A debt due from a foreign railroad corporation, operating no railroad in West Virginia, and doing no business in such state other than maintaining jointly with other railroads an agency relating to through freight service, and for the soliciting freight for such company, to be handled on its lines without the state, is not within the jurisdiction of the courts of the state, and not subject to garnishments there; the corporation not doing business within the state within the meaning of the statute in question. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 7 R. R. R. 413, 30 Am. & Eng. R. Cas., N. S., 413, 44 S. E. 300.

Authority to Assist in Selling Railroad's Lands.—In *Union Pac. R. Co. v. Miller*, 87 Ill. 45, 18 Am. Rep. 400, it is held that in a suit against a railroad corporation created by act of Congress, not residing or doing business in Illinois, and having no office or place of business in the state, service of process upon an agent appointed by

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a land commission of the corporation, and its trustees, whose business it is merely to receive and transmit offers for lands and to assist in making sales, will not give the court jurisdiction; such person not being an agent of the corporation, within the meaning of a statute of Illinois providing for service of process upon such corporations.

Broker Selling on Commission—Business Agent in State.—In *Doe v. Springfield, etc., Mfg. Co. (C. C. A.)*, 104 Fed. Rep. 684, it appeared that a broker in San Francisco, at his own solicitation, was furnished prices by a machinery manufacturing corporation of Illinois, and occasionally made a sale of articles made by it, to be delivered on board cars at the factory, adding to the price given him a commission for himself. The company declined to appoint him an agent, and paid him nothing. It was held that such transaction did not constitute a doing of business by the corporation in California, nor make such broker its business agent in that state, within the meaning of Cal. Code Civ. Proc. § 411, so that service of monition upon him in a suit in admiralty would give the court jurisdiction of the corporation.

No Agent, Business or Property within State—Traveling Salesman—Connection with Cause of Action.—But in *Abbeville Elect. L. & P. Co. v. Western Elect. Supply Co.* 61 S. Car. 361, it is held that personal service within South Carolina of a summons and complaint, alleging a cause of action arising within the State, on the traveling salesman of a foreign corporation not having a resident agent, a place of business or property within the State, who visits South Carolina in relation to the transaction (sale of machinery) out of which the suit arose, is a good service on the foreign corporation, he being its "agent," within S. Car. Code, 155.

Combination of Foreign Railroads—Service upon Resident—Soliciting Agent.—In *Archer Daniels Linseed Co. v. Blue Ridge Dispatch (Minn.)*, 40 R. R. R. 143, 63 Am. & Eng. R. Cas., N. S., 143, 129 N. W. 765, it appeared that several foreign railway corporations, having no lines in Minnesota, entered into an arrangement by which they adopted the name "Blue Ridge Dispatch," and under that name established an agency in the city of Minneapolis, and appointed an agent, with authority to solicit business for shipment over its lines. In pursuance of such authority, the agent received money from shippers in payment for transporting goods over its lines, issued bills of lading, and designated the points of delivery to the initial carrier in Minneapolis. In an action to recover damages by a shipper whose goods were received by the Blue Ridge Dispatch at such city for through shipment, it was held that service of process upon such agent in such city was service upon the constituent railroad companies.

Authority to Store and Sell Powder for Manufacturer.—In *American Gold Min. Co. v. Giant Powder Co.*, 1 Alaska 664, it is held that one who receives and stores for sale consignments of giant powder from

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the manufacturer, a foreign corporation not qualified to do business in Alaska for failure to comply with the law requiring it to file its articles, etc., and who is responsible to the corporation for the amounts of such sales, is an agent upon whom service of summons in a suit against the corporation may be made.

23. Temporarily within State, and Not on Corporation's Business.

It is generally held that where a foreign corporation is not domiciled within a state, does no business therein, and has designated no one to accept service for it, valid service cannot be made upon one of its officers or agents who happens to be within the state merely for his own pleasure or convenience, or upon some business other than that of the corporation.

United States.—*Bentlif v. London, etc., Finance Corp.* (C. C.), 44 Fed. Rep. 667; *Remington v. Central Pac. R. Co.* 198 U. S. 95, 49 L. Ed. 959; *Case v. Smith, etc., Co.*, 152 Fed. Rep. 730; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Fidelity Trust, etc., Co. v. Mobile St. Ry. Co.* (C. C.), 53 Fed. Rep. 850; *Reilly v. Philadelphia, etc., Ry. Co.* (C. C.), 109 Fed. Rep. 349; *Reifsnider v. American Imp. Pub. Co.* (C. C.), 45 Fed. Rep. 433; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* (C. C.), 32 Fed. Rep. 802, 805; *United States Graphite v. Pacific Graphite Co.* (C. C.), 68 Fed. Rep. 442.

California.—*Fox v. Hale, etc., Min. Co.* 108 Cal. 369, 41 Pac. 308.

Connecticut.—*Middlebrooks v. Springfield Fire Ins. Co.* 14 Conn. 301.

Illinois.—*Midland Pac. Ry. Co. v. McDermid*, 91 Ill. 170; *Silsbee v. Quiney Hotel Co.* 30 Ill. App. 204.

Michigan.—*Newell v. Great Western Ry. Co.* 19 Mich. 336.

Missouri.—*Latimer v. Union Pac. Ry.* 43 Mo. 105.

New Jersey.—*Mulheam v. Press Pub. Co.* 53 N. J. 153, 20 Atl. 760; *Monlin v. Trenton, etc., Ins. Co.* 24 N. J. L. 222.

New York.—*Brewster v. Michigan Cent. R. Co.* 5 How. Pr. (N. Y.), 183; *Coler v. Pittsburgh Bridge Co.* 146 N. Y. 281, 40 N. E. 779; *Hulbert v. Hope Mutual Ins. Co.* 4 How. Pr. (N. Y.), 275.

Oregon.—*Aldrich v. Anchor Coal, etc., Co.* 24 Ore. 32, 32 Pac. 756.

Pennsylvania.—*Phillips v. Library Co.*, 141 Pa. St. 462, 21 Atl. 640.

No Business Nor Property in State—Director Casually within State.—In *Remington v. Central Pac. R. Co.* 198 U. S. 95, 49 L. Ed. 959, it is held that service on a director of a foreign corporation, which is doing no business and has no property in the State, when he is casually in the State for a few days, is bad.

Domicile—Resident Officer—Officially within State.—The residence of an officer of a foreign corporation in a State does not necessarily give the corporation a domicile in such State. He must be there officially, representing the corporation in its business. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122.

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President in State on His Private Business.—In *Reifsnider v. American Imp. Pub. Co. (C. C.)*, 45 Fed. Rep. 433, it is held that no jurisdiction of a foreign corporation which does not maintain an office or transact business in the state is acquired by serving process on its president when he is within the state casually on his private business.

President Temporarily within District.—When a non resident corporation is not doing business in the jurisdiction, service on its president, temporarily present in the district is not effective under the statutes of Alabama. *Fidelity Trust, etc., Co. v. Mobile St. Ry. Co. (C. C.)*, 53 Fed. 850.

Director Merely Found in District.—Service of process upon a director of a foreign corporation, who is found within the district, but who neither transacts any corporate business therein, nor is charged with any business of the corporation, is not, under the general law, a sufficient service to give a federal court jurisdiction over the corporation. *Reilly v. Philadelphia, etc., Ry. Co. (C. C.)*, 109 Fed. 349.

Office in State in Charge of Sales Agent—Officer Casually in State.—A federal court cannot acquire jurisdiction of a foreign corporation which is not doing business within the state of suit and has no property within such state with relation to which the suit is brought, by service of process on an officer who is casually within the state, and the fact that the corporation maintains an office within the state of suit, in charge of a salaried sales agent, who takes orders for goods to be accepted and filled by the corporation at its home office, does not constitute doing business within the state such as to validate the service. *Case v. Smith, etc., Co.* 152 Fed. Rep. 730.

Neither Business Nor Place of Business in State—Director Found in State.—In *Bentlif v. London, etc., Finance Corp. (C. C.)*, 44 Fed. Rep. 667, it is held that where an action against a foreign corporation, which neither does business nor has a place of business or property in New York, is begun under N. Y. Code Civ. Proc. 432, by service of process upon a director thereof, found in the state, but not there in any official capacity or in the business of the corporation, the court acquires no jurisdiction.

No Business within State—Officer or Agent Temporarily in State.—In a personal action against a foreign corporation, which does not do business within the state, service upon an officer or agent temporarily within the state is not a good service on the corporation. *Conley v. Mathieson Alkali Works (C. C.)*, 110 Fed. Rep. 730.

No Place of Business within State—Officer Casually within State.—Service of process on an officer of a foreign corporation casually within a state where the corporation has no place of business is not good. *United States Graphite v. Pacific Graphite Co. (C. C.)*, 68 Fed. Rep. 442.

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Summons Served on Secretary Temporarily within State—Portion of Stockholders Residents of State.—A foreign corporation, of which a portion of the stockholders reside in Connecticut, is not liable to be sued, by writ of summons in the courts of that state; therefore, where an action was brought in the county of F. in Connecticut, by an inhabitant of that county, against a corporation of Massachusetts, and the process was a summons only, and was served by leaving a copy with the secretary of the corporation, an inhabitant of Massachusetts, while he was temporarily in the county of F., and some of its stockholders resided in Connecticut, it was held that the court to which the suit was so brought had not jurisdiction of the case. *Middlebrooks v. Springfield Fire Ins. Co.* 14 Conn. 301.

Accrual of Cause of Action in Foreign Jurisdiction—Suit by Non-Resident—Officer Casually within State.—In *Newell v. Great Western Ry. Co.* 19 Mich. 336, it is held that service of a declaration as commencement of a suit by a non-resident, against a railroad corporation created by a foreign government, the cause of action arising within the jurisdiction of such government, upon an officer of the corporation, then being casually within Michigan, but not there in the performance of the duties of his office, nor authorized, in any way, by the corporation to submit to such service, confers no jurisdiction.

Vice President in State to Testify in Another Action.—In *Mulhearn v. Press Pub. Co.* 53 N. J. L. 150, 20 Atl. 760, it is held that the vice president of a foreign corporation, who comes into New Jersey to give testimony before a commissioner of the Supreme Court of the state, which is to be used on a motion to set aside the service of summons issued in an action against such corporation, made in New Jersey upon a person supposed to be an agent of such corporation, is privileged from the service of a summons in another action against the corporation while he is so in attendance as a witness.

Contracts Made within State or Debts Due Residents—President Casually in State.—The service of a summons upon a president of a foreign corporation who happens to be temporarily in New York, and who does not voluntarily appear, does not give the court jurisdiction of the defendant corporation for the purpose of rendering personal judgment upon contracts made in New York, or for debts due to residents of the state. *Hulbert v. Hope Mutual Ins. Co.* 4 How. Pr. (N. Y.), 275; *Brewster v. Michigan Cent. R. Co.* 5 How. Pr. (N. Y.), 183.

Neither Agency Nor Property within State—Agent or Officer Casually within State.—Where a foreign corporation is not engaged in business in Oregon, and has neither an agency nor property therein, service of process upon an agent or officer of the corporation who resides in another jurisdiction, and is only casually within the state, will not confer jurisdiction, unless there is a special stat-

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ute authorizing such service. *Aldrich v. Anchor Coal Co.* 24 Ore. 32, 32 Pac. 756.

Selling Goods through Agent—Officers in State on Other Business.—But in *Cone v. Tuscaloosa Mfg. Co. (C. C.)*, 76 Fed. Rep. 891, it is held that a corporation to organized manufacture and sell goods, which conducts its manufacturing in the state where it is organized, but regularly sells some of its goods through a selling agent in another state, is doing business in the latter state, so as to render valid a service of process made upon one of its officers while he is casually in such latter state on other business.

Officer Temporarily in State on Unofficial Business—Doing Business in State—In Hands of Receiver.—And under Mills' Ann. Code, § 38, subd. 9, providing that service in an action against a foreign corporation engaged in business within Colorado may be had upon any agent of the corporation found in the county in which the action is brought, service of process, in an action relating to its corporate property, against a foreign corporation doing business in the state, but in the hands of a receiver, is legally sufficient when made on an officer of the corporation whose residence is in another state, and who at the time of the service is temporarily in Colorado on business not connected with the corporation; and the fact that such officer invited such service would be pertinent in determining its validity. *Venner v. Denver Union Water Co.* 40 Colo. 212, 90 Pac. 623.

Agent for Inducing Emigrants to Buy Railroad's Lands—Office in Foreign State—Director in State on His Own Business.—In *Hiller v. Burlington, etc., R. Co.*, 70 N. Y. 223, 18 Am. Ry. Rep. 557, it appeared that plaintiff made a contract with defendant, a foreign railroad corporation, to enter its service for a term of years, his business being to procure emigrants to purchase and settle defendant's lands in Nebraska. Plaintiff was bound to maintain during the whole time an office in the city of New York. He entered upon the employment and kept open an office in such city until the contract was terminated by defendant. In an action for services under such contract and for damages for its breach, it was held that the cause of action arose within New York, and therefore service of summons upon one of defendant's directors while he was temporarily within the state on his own business was a good service, although defendant had no property in the state.

Not in Business within State—Absence of Proof—Foreclosure of Mortgage—Secretary Casually within State.—In *Camerson & Co. v. Jones, etc., Mach. Works*, 41 Tex. Civ. App. 4, 90 S. W. 1129, it is held that in the absence of proof that a defendant foreign corporation was not engaged in business in Texas, service of citation upon its secretary while he is casually in the state will confer jurisdiction upon the District Court to foreclose a mortgage lien upon personal property, as against such foreign corporation.

Note

Withdrawal from Foreign State—Suit on Contract Made therein—Officers in Such State.—In *Moulin v. Trenton, etc., Ins. Co.* 25 N. J. L. 57, it is held that if a corporation, chartered in New Jersey, open an office and transact business in another state, and afterwards withdraws and ceases to transact in that state, and after such withdrawal a suit is commenced against the company in such state, on a contract made therein, and process is served upon its officers when in that state, the corporation will be properly in court under such process.

24. Temporarily within State on Corporation's Business.

But when an officer or agent of a foreign corporation is within the state on the business of his corporation, process served upon him, in an action connected with such business, will confer jurisdiction over the foreign corporation.

United States.—*Brush Creek Coal, etc., Co. v. Morgan-Gardner Elect. Co.* (C. C.), 136 Fed. Rep. 505; *Houston v. Filer, etc., Co.* (C. C.), 85 Fed. Rep. 757; *New Haven Pulp, etc., Co. v. Dowington Mfg. Co.* (C. C.), 130 Fed. Rep. 605; *Eirich v. Donnelly Contracting Co.* (C. C.), 104 Fed. Rep. 1.

Indiana.—*Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143.

Kansas.—*North Mo. R. Co. v. Akers*, 4 Kan. 453.

Louisiana.—*Gravely v. Southern Ice Mach. Co.* 47 La. Ann. 389, 16 So. 866; *Southern Sawmill Co. v. American, etc., Lumber Co.* 115 La. 237, 38 So. 977.

Nebraska.—*Klopp v. Creston City, etc., Co.* 34 Neb. 808, 52 N. W. 819.

New York.—*Rudd v. McLean, etc., Co.* 54 N. Y. Misc. 49, 105 N. Y. Supp. 387; *Porter v. Sewall Safety Car-Heating Co.* (N. Y. Sup. Ct.), 7 N. Y. Supp. 166; *Pope v. Terre Haute, etc., Co.* 87 N. Y. 137, affirming 24 Hun 238, 60 How. Pr. 419; *Jester v. Baltimore Steam Packet Co.* 131 N. Car. 54, 42 S. E. 447.

General Officer in State to Adjust Difference between Parties.—Service of process upon a general officer of a foreign corporation, who voluntarily came into the state to adjust a difference between the corporation and plaintiff with reference to the subject matter of the suit, while such agent was within the state, was sufficient to confer jurisdiction of the corporation. *Brush Creek Coal, etc., Co. v. Morgan-Gardner Elect. Co.* (C. C.), 136 Fed. Rep. 505.

Officer of Successor Corporation in Connecticut on Business Connected with Contract of Predecessor.—In *New Haven Pulp, etc., Co. v. Downington Mfg. Co.* (C. C.), 130 Fed. Rep. 605, it appeared that an officer and authorized agent of defendant, a manufacturing corporation of another state, was in Connecticut on business connected with a contract made with plaintiff by the predecessor of defendant, to whose rights and liabilities it had succeeded, when he was served with summons in an action brought by plaintiff against defendant in the federal court for Connecticut, for breach of the same contract.

Note

Neither defendant nor its predecessor had ever maintained an office or agent in Connecticut, but they had made a number of sales in the state, including the one to plaintiff which was in controversy. It was held that such service was good.

One with Authority to Contract Debt within State—Temporarily within State.—In *Klopp v. Creston City, etc., Co.* 34 Neb. 808, 52 N. W. 819, it is held that where a foreign corporation contracts a debt in Nebraska, as for labor and materials, service in the state upon the managing agent is sufficient, although he is but temporarily within the state. In this case it is said in the opinion. "But a person who has authority to contract a debt for the corporation within this state, is so far the managing agent within the state, that service may be had upon him for that debt, that will bind the corporation."

"Found within District—President Temporarily within District.—But a foreign corporation is not "found" within a district, within the meaning of a statute providing for service of process, when its president merely comes temporarily into such district upon the business of the corporation, the corporation having no office or place of business therein, and not having transacted any business therein, except that which the president came to settle. *Good Hope Co. v. Railway Barb Fencing Co. (C. C.)*, 22 Fed. Rep. 635.

"Found" within District—Officer in State Superintending Harbor Work.—In *Eirich v. Donnelly Contracting Co. (C. C.)*, 104 Fed. Rep. 1, it is held that a corporation of New York having its office in Buffalo, which does not maintain, and has never maintained, any office or place of business in the state of Ohio, is not "found" in that district, within the meaning of the federal statutes, so as to be subject to suit there merely because one of its officers is temporarily in Ohio, superintending work being done by the corporation in a harbor, under a contract with the United States; and service of process upon such officer confers no jurisdiction on the courts of the state or district over the corporation.

Presumption That Officer Is within State on Official Business.—Where service of process was had upon the president of a foreign corporation in Michigan under How. Stat. § 8145, and the defendant denied the legality of such service for the reason, among others, that the officer was not in the state on official business or in his official character, it was held that it was not necessary that the officer upon whom service is made should be in the state upon official business for the corporation, or be specially authorized to receive service of process, but that he must be presumed and held to be such officer for the purpose of the statute. *Shickle, etc., Iron Co. v. Wiley Const. Co.* 61 Mich. 226, 28 N. W. 77.

President Attempting to Settle Claim While in State.—In *Louden Machinery Co. v. American, etc., Iron Co. (C. C.)*, 127 Fed. Rep. 1008, it appeared that plaintiff, an Iowa corporation, purchased certain iron products of defendant, an Illinois corporation, to be de-

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livered f. o. b. Chicago. A difference occurring between the parties was attempted to be settled by their attorneys, who resided in Chicago, and they having failed to do so, defendant's president, having occasion to travel through Iowa, stopped at plaintiff's place of business in order to settle the claim, and, on his stating that it would be necessary to lay plaintiff's proposition before defendant's board of directors, notice of suit was served on him. Defendant owned no property in Iowa, never had an agency in the state, and never did any business there. It was held that such service on defendant's president was insufficient to confer jurisdiction on the Iowa courts.

Secretary Attending Federal Court—Selling Goods Through Traveling Salesmen.—In *American Wooden-Ware Co. v. Stem* (C. C.), 63 Fed. Rep. 676, it is held that service of process on a foreign corporation by serving its secretary, while he was temporarily in the state in attendance on a federal court to testify as a witness in a cause to which such corporation was a party, was invalid, it appearing that such corporation did no business in the state except selling goods through a travelling salesman, and in one instance buying a stock of goods and selling them through an agent specially appointed for that purpose.

President in State as Witness for Corporation—Duration of Right to Exemption.—The right to exemption from service of process of a non-resident president and treasurer of a foreign corporation, in an action against the latter, where he comes voluntarily into the state of New York as a witness in an action by the corporation pending therein, only lasts while he is in attendance at the trial and for the time thereafter sufficient to enable him to return home. *Sizer v. Hampton, etc., Lumber Co.* 57 N. Y. App. Div. 390, 68 N. Y. Supp. 232.

President in State upon Invitation of President of Domestic Corporation, to Adjust Claim.—In *Olean St. R. Co. v. Fairmount Constr. Co.*, 55 N. Y. App. Div. 292, 67 N. Y. Supp. 165, it is held that the service of summons, in an action by a domestic corporation against a foreign corporation, upon the president of the latter, while in New York upon the invitation of the president of the domestic corporation, for the purpose of adjusting a claim against such corporation, will be set aside, although the president of the domestic corporation denies that the invitation was a trick or device for the purpose of obtaining the service.

25. Appointment of Foreign Receiver, Effect of.

The appointment of a receiver for a foreign corporation by a foreign court does not affect the right to make service against any proper officer or agent of the corporation who may be within the state. *Thomas v. Placerville, etc., Co.* 65 Cal. 600, 4 Pac. 641; *Pollock v. Carolina, etc., Loan Ass'n*, 48 S. Car. 65, 25 S. E. 977.

Note

Resident Agent—Effect of Appointment of Receiver by Foreign Court.—The appointment of a receiver by a foreign court for a foreign corporation, which has a resident agent, property, and is doing business, in South Carolina, does not affect the service of process upon such agent in the state. *Pollock v. Carolina, etc., Loan Ass'n*, 48 S. Car. 65, 25 S. E. 977.

Station Agents or Clerks of Receivers within State.—Act Cong. March 3, 1887, §§ 2, 3, provides that receivers in possession of property shall manage it according to the laws of the state where it is situated and may be sued without leave of the court by whom they were appointed. In Arkansas service of process on the clerk or station agent of a railroad company is good service on the company. It was held that where receivers of a railroad running through Arkansas, who were appointed in that state, had removed into another state, the court would authorize them to be sued in the state courts of Arkansas by service on their station agents or clerks therein. *Central Trust Co. v. St. Louis, etc., Ry. Co. (C. C.)*, 40 Fed. Rep. 426.

26. Miscellaneous.

"Insurance Agent"—Secretary of Local Division of Beneficial Association.—In *Dixon v. Order of Railway Conductors of America (C. C.)*, 49 Fed. Rep. 910, it is held that where the regulations of an association having a benefit department require the secretary of each local division to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department joining his division by transfer from any other division, and also make it the duty of members to notify him of any changes of residence, such secretary must be considered an insurance "agent" of the association, under Wis. Rev. St. § 2637, Subd. 9, and section 1977, declaring who shall be considered agents of a foreign insurance company for the purpose of receiving service of process.

Superintendent Managing Railroad Line in State.—In *President, etc., of Bank of Commerce v. Rutland, etc., R. Co.* 10 How. Pr. (N. Y.), 1, it is held that service in New York upon the superintendent and general managing agent of a foreign railroad corporation, in the possession of, and using a railroad in the state, is a good service within § 134 of the New York Code.

Resident Director—No Officers in State.—In *Honeyman v. Colorado, etc., Iron Co. (C. C.)*, 133 Fed. Rep. 96, it is held that a plaintiff exercised due diligence to obtain service of summons and complaint on the officers of a foreign corporation defendant, so as to authorize service on a director under the laws of New York, where before making service on the director he called at the office of the secretary and was told by the clerk in charge that neither the secretary nor any other officer of the company was within the state and was given by such clerk the names of the resident directors on whom the service might be made.

Note

Corporation as "Agent" of Foreign Corporation.—A corporation doing business in Missouri, may, for the purpose of process, be an "agent" of a foreign corporation, within the meaning of the Missouri statute prescribing how process must be served on foreign corporations. *Newcomb v. New York, etc., R. Co.* 182 Mo. 687, 81 S. W. 1069.

Debt Due Non-Resident—Extension of Railroad into State—Condition—Resident Officer.—In *Fithian v. New York, etc., R. Co.* 31 Pa. St. 114, it is held that a foreign railroad corporation that has accepted the privilege of extending its lines into Pennsylvania, upon the condition that it shall keep at least one manager or other officer resident within state, or when process in actions against the company may be served, may be made garnishee in an attachment execution, in respect to a debt owing by them to a non-resident.

Transaction of Business in Foreign State—Foreign Statute—Enforcement of Judgment against Domestic Corporation.—In *Firemen's Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488, it is held that a judgment of another state against a domestic corporation, upon service made upon one declared by the statute of such state to be an agent of such corporation, will be enforced in Illinois, where such corporation has voluntarily transacted business in such other state in such manner as to bring itself within its jurisdiction.

Service of Monition in Admiralty on Non-Resident.—Service of monition in admiralty may be made on an agent of a non-resident defendant in conformity with a state statute authorizing such mode of service in actions at law or in equity. *Insurance Co. v. Frederick, etc., Co.* (D. C.), 139 Fed. Rep. 67.

Power of Insurance Commissioner to Appoint Successor to Agent.—In *Equity Life Ass'n v. Gammon*, 119 Ga. 271, 46 S. E. 100, it is held that where a foreign corporation maintained no place of doing business within the state, but appointed an agent under Ga. Civ. Code, § 2057, and such agent absented himself from the state, the state insurance commissioner could appoint a successor with authority to acknowledge and receive service of process in behalf of such company, in all proceedings that might be instituted against it, on contracts made in Georgia, in any court of the state, and the power of the commissioner to appoint a successor to the agent originally named, and the authority of the latter to acknowledge and receive service, continues so long as there is any necessity to sue the company for breach of contracts in Georgia.

Appointment of Agent by Commissioner of Insurance—Residence of Corporation.—A foreign insurance company which fails to maintain an agency does not, by appointing, or having the commissioner of insurance to appoint, an agent upon whom service may be perfected under Ga. Civ. Code, § 2057, acquire a fixed residence in the county of the residence of such agent and where a contract was entered into by a foreign corporation in C. county, and a suit was there brought, but the agent, who resided in F. county, acknowledged

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service, the court of C. county had jurisdiction to try the cause. *Equity Life Ass'n v. Gammon*, 119 Ga. 271, 46 S. E. 100.

On Person Who Handed Summons to Agent Next Day—Verbal Admission.—A marshal returned that he had made personal service on the agent of a foreign corporation, but he had in fact left the summons with a person in charge of the agent's office, who handed it to the agents on the following day. On the latter day the agent verbally admitted service, in a conversation with the marshal. It was held that the service, though irregular, was not illegal, and should not be set aside on motion. *Union Pac. Ry. Co. v. Novak* (C. C. A.), 61 Fed. Rep. 573.

Person Collecting Bill for Corporation.—In *Honerine Min., etc., Co. v. Tallerday, etc., Co.* 31 Utah 326, 88 Pac. 9, it is held that Utah Rev. St. 1898, sec. 2948, as amended by Laws 1899, ch. 51, p. 74, Laws 1905, ch. 105, p. 126, providing that service of summons on a foreign corporation must be by delivering a copy to an officer * * * "or other agent having the management, direction or control of any property of such corporation," did not authorize service on a person who had no connection with the defendant foreign corporation except that he was intrusted by its vice president with the collection of a bill due the corporation in Utah, where he was temporarily.

Attorney Employed to Keep Books—Employment Discontinued by Receiver.—Laws N. J. 1896, p. 277, c. 185, requires every corporation, under a penalty, to file annually with the secretary of state a statement giving its principal office in the state, and the name of the agent in charge, upon whom process against the corporation may be served, and authorizes service on such agent. Previously the statute provided for service only on officers or directors of the corporation. A corporation previously organized designated its principal office in the state, as required by the statute then in force, at the office of an attorney, to whom it paid a sum as rental, and for keeping the books which were required to be kept there. It failed to designate any agent under Act 1896, and was subsequently adjudged insolvent, and a receiver appointed for its property, who discontinued the payments to the attorney. It was held that service upon such attorney in an action thereafter brought against the corporation was not a good service against the corporation, under the statute. *Nickolson v. Wheeling, etc., Coal Co.* (C. C.), 110 Fed. Rep. 105.

Foreign Railroad Majority Stockholder of Domestic Railroad Company.—The ownership by a foreign railway company of a controlling interest in the stock of a domestic railroad corporation which retains its own officers, has property of its own, and is responsible for its contracts and to persons with whom it deals, does not make the foreign corporation liable to service of process within the state on the theory that it is doing business therein through the agency of the domestic corporation. *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 25 R. R. R. 247, 48 Am. & Eng. R. Cas., N. S., 247, 27 Sup. Ct. Rep. 513.

Note

Relation Merely Contingent.—In an action against a foreign corporation, service of summons upon a person whose only connection with defendant was a contingent one, which had ceased before the action commenced, is not service on an agent of the company within the meaning of section 88 of the New Jersey act concerning corporations. *Hass v. Security Ins. Co.*, 57 N. J. L. 388, 30 Atl. 430.

III. RAILROADS.

1. President or Other Chief Officer.

Even at common law, service of process upon the president or other chief officer of a railroad corporation, where the action is against it, will bind the company.

Alabama.—*East Tenn., etc., R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

Georgia.—*Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

Indiana.—*Branham v. Fort-Wayne, etc., R. Co.*, 7 Ind. 524; *Louisville, etc., R. Co. v. Cauble*, 46 Ind. 277, 6 Am. Ry. Rep. 349; *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *New Albany, etc., R. Co. v. McNamara*, 11 Ind. 542; *New Albany, etc., R. Co. v. Powell*, 13 Ind. 373; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3.

Kentucky.—*Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 18 Am. Ry. Rep. 221.

Missouri.—*Horn v. Missouri, etc., Ry. Co.*, 88 Mo. App. 470.

South Carolina.—*Glaize v. South Carolina R. Co.*, 1 Strobb. (S. Car.), 70.

Texas.—*El Paso, etc., Ry. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855.

West Virginia.—*Taylor v. Ohio River Ry. Co.*, 35 W. Va. 328, 13 S. E. 1009.

2. Directors.

Under some statutes a railroad company may be brought into court by virtue of service of summons upon one of its directors. *Curtis v. Avon, etc., R. Co.*, 49 Barb. (N. Y.), 148; *Wheeler v. New York, etc., R. Co.*, 24 Barb. (N. Y.), 414. But see *Alabama, etc., R. Co. v. Burns*, 43 Ala. 169.

3. Managing Agent.

Many of the statutes on the subject, probably all, render service of process upon a managing agent of a railroad company sufficient to confer jurisdiction over the latter. *Denver, etc., R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595; *Toledo, etc., Ry. Co. v. Owen*, 43 Ind. 405; *Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332; *New York & E. R. Co. v. Purdy*, 18 Barb. (N. Y.), 574; *Alabama, etc., R. Co. v. Burns*, 43 Ala. 169.

Station Agent.—A railroad station agent, having the ordinary authority of such position, is a "managing agent" of his company,

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within the meaning of section 5252 N. Dak. Rev. Codes 1899, so as to make service of summons upon him, in a civil action against the railroad company, service upon the company. *Brown v. Chicago, etc., Ry. Co.*, 12 N. Dak. 61, 95 N. W. 153.

A station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight, and to collect for freight shipments, is a managing agent, within the meaning of section 5252, R. I. Rev. Codes 1899, so as to make service of summons upon him, in a civil action against the railroad company, service upon such corporation. *Dyer v. Union R. Co.*, 25 R. I. 221, 8 R. R. R. 782, 31 Am. & Eng. R. Cas., N. S., 782, 55 Atl. 688.

Ceased to Do Business within State—Attorney in Charge of All Business within State.—In *Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332, it is held that where a foreign corporation had ceased to do business in Kentucky, an attorney who, as general counsel, had charge of all the business of the company in the state, and who was its only general officer in the state, was its "managing agent", within the meaning of Ky. Civil Code Practice, section 732, subsection 33, providing that the "managing agent" of a corporation shall be deemed "its chief officer", for the purpose of service of process, where it has no one of several other officers in the state.

Mere Sale by Domestic Company of Coupon Ticket for Passage over Connecting Line of Foreign Company.—The I. railroad was extended into Nebraska from Ft. Dodge, Iowa, having its terminus in Omaha, where it maintained its station and agency. The M. railroad company had a line of railroad running northward from Ft. Dodge to Minneapolis and St. Paul, Minn., but no part of its line entered Nebraska, nor was it shown that it had any place of business or agency within the city of Omaha, or elsewhere in Nebraska. The I. railroad company, by its agent, sold plaintiff a coupon ticket in the usual form, which authorized plaintiff to travel over its line of road from Omaha to Ft. Dodge and thence over the line of the M. road from the latter city to Minneapolis and return, as a passenger; and while passing over that line of road, plaintiff received the injury complained of. This suit was brought in the district court against both companies, and service of summons was made upon the I. railroad company in the usual manner for service of summons on railroad companies, and upon the I. railroad company and its agent as the managing agents of the M. company. It was held that the mere sale of the coupon ticket, such as is sold over connecting lines generally, did not constitute the I. company or its agent the managing agents of the M. railroad company upon whom service of summons might be made. *Ritchie v. Illinois Cent. R. Co.*, 87 Neb. 631, 38 R. R. R. 600, 61 Am. & Eng. R. Cas., N. S., 600, 128 N. W. 35.

4. Freight or Passenger Agent.

Under some statutes a railroad corporation may be brought into court by serving the summons upon one of its freight or passenger

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agents. Toledo, etc., Ry. Co. *v.* Owen, 43 Ind. 405; Nashville, etc., R. Co. *v.* Hamilton, 16 Ky. L. Rep. 68, 26 S. W. 537; Davis *v.* Jacksonville, 126 Mo. 69, 28 S. W. 965; Tuchband *v.* Chicago, etc., R. Co., 16 N. Y. Civ. Proc. 241, 5 N. Y. Supp. 493; Harrow *v.* Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926.

Local Freight Agent as General Agent.—A local freight agent is a general agent of a railroad corporation within the meaning of a statute providing for service of summons upon corporations. Toledo, etc., Ry. Co. *v.* Owen, 43 Ind. 405.

5. Station Agent.

There are statutes providing that process against a railroad may be served upon the nearest station agent.

United States.—Dinzy *v.* Illinois Cent. R. Co. (C. C.), 61 Fed. Rep. 47.

Alabama.—East Tenn., etc., R. Co. *v.* Bayliss, 19 Am. & Eng. R. Cas., 480, 74 Ala. 150.

Arkansas.—Ex parte St. Louis, etc., Ry. Co., 40 Ark. 141.

Georgia.—Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

Kentucky.—Louisville, etc., Ry. Co. *v.* Commonwealth, 104 Ky. 35, 46 S. W. 207.

Michigan.—Detroit *v.* Wabash, etc., Ry. Co., 63 Mich. 712, 30 N. W. 321; Grand Trunk Ry. Co. *v.* Wayne Circuit Judge, 106 Mich. 248, 69 N. W. 17; Turner *v.* St. Clair Tunnel Co., 102 Mich. 564, 61 N. W. 72.

Minnesota.—Hillary *v.* Great Northern Ry. Co., 64 Minn. 361, 67 N. W. 80.

Mississippi.—Alabama, etc., Ry. Co. *v.* Bolding, 69 Miss. 255, 13 So. 846.

Missouri.—Antonelli *v.* Basile, 93 Mo. App. 138; Dunn *v.* Missouri Pac. Ry. Co., 45 Mo. App. 29; Farmer *v.* Missouri Pac. Ry. Co., 19 Mo. App. 250; Heath *v.* Missouri, etc., Ry. Co., 83 Mo. 617; Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126; Proctor *v.* Missouri, etc., Ry. Co., 42 Mo. App. 124.

North Dakota.—Brown *v.* Chicago, etc., Ry. Co., 12 N. Dak. 61, 95 N. W. 153.

Depot Agent.—In action against a railroad company for injuries to stock, the summons and complaint may be served, under Ala. Code, § 1714, on a "depot agent", without the affidavit required by section 2935, in other actions against corporations, when the service is on any other person than the "president, or other head thereof, secretary, cashier, or managing agent." East Tenn., etc., R. Co. *v.* Bayliss, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

Upon Clerk or Agent of Any Station in County.—In Ex parte St. Louis, etc., Ry. Co. 40 Ark. 141, it is held that a summons upon a railroad company may now (1883), by statute, be served upon a station agent or other person having control of any of the company's

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business, who has to report to the company, or upon the clerk or agent of any station in the county where it is issued.

Agent in Charge of Station in Indian Territory—Arkansas Statute.—In *Eddy v. Lafayette* (C. C.), 49 Fed. Rep. 807, it is held that for injuries committed in the Indian Territory, receivers of a railroad sued therein are properly served by delivering a copy of the summons to one of their station agents in charge at a station therein, under the Arkansas Laws made applicable to the Indian Territory, providing that such service is sufficient to confer jurisdiction when defendant is a railroad company or a foreign corporation.

Action against Lessee Railroad—Depot Agent—Letter to President—Return.—Where one railroad in Georgia has leased and is operating another, in a suit against the lessee, an entry of service by the sheriff by serving personally its depot agent is sufficient; and it is not necessary for such entry to show the deposit and mailing of a letter to the president of the company. *Central R. Co. v. Smith*, 69 Ga. 268.

On Station Agent—Principal Place of Business Not in County.—Under § 1529, Miss. Code 1880, service of summons on the station agent of a railroad company is binding on the company, whether its principal place of business is in the county in which the suit is brought or not. *Alabama, etc., Ry. Co. v. Bolding*, 69 Miss. 255, 13 So. 846.

Stock Killing Case—Depot or Station Agent—Residence in County.—In an action against a railroad company to recover for killing stock on track, the summons may be served upon a depot or station agent in the actual employment of the company residing in the county or township wherein the action is brought. *Douglass v. Kanawha, etc., Ry. Co.* 44 W. Va. 267, 28 S. E. 705.

Action on Contract for Labor.—Under Tay. St. 1355, Sec. 20, in all actions for damages against a railroad company, summons may be served on any station or depot agent of the company, and this applies to an action on contract for labor or services. *Ruthe v. Green Bay, etc., R. Co.*, 37 Wis. 344.

Station or Ticket Agent—State Statute—Federal Courts.—Service of summons upon a station or ticket agent, in accordance with a statute of the state in which the district is located, will vest the federal courts with jurisdiction in a suit against a foreign railroad corporation. *Dinzy v. Illinois Cent. R. Co.* (C. C.), 61 Fed. Rep. 49.

One Incidentally Selling Tickets.—Under section 51 of Ky. Civil Code, subsection 4, which requires the summons in an action against a common carrier operating a railroad to be served upon its passenger or freight agent at the county seat or the station nearest thereto, service of a summons upon one who sold tickets was sufficient, though such selling was merely incidental to his other business. *Louisville, etc., Ry. Co. v. Commonwealth*, 104 Ky. 35, 46 S. W. 207.

“Commercial Agent” Not Station Agent.—But a station agent

• Note

means the agent locally in charge of the station or depot, and generally it is not at the end of the road, but at some intermediate place, although there may, no doubt, be such an agent at the terminus, but the name cannot apply presumptively, if at all, to any but one who has general charge at the place where he acts; and there is nothing in the name "commercial agent" which necessarily indicates local authority or functions; and under How. Stat. § 8147, amended by Act 207, Mich. Laws of 1885, authorizing the service of papers on the station or ticket agent of a railroad company, a return of service on one as its "commercial agent" does not show a sufficient service. *City of Detroit v. Wabash, etc., Ry. Co.*, 63 Mich. 712, 30 N. W. 321.

Upon Conductor of Cattle Train at Point on Branch Line.—And in *Chicago, etc., Ry. Co. v. Groves (Okla.)*, 16 Am. & Eng. R. Cas., N. S., 850, it is held that under a statute providing that service of process may be had by "leaving a copy thereof * * * at any depot or station, of such corporation in such county, with some person in charge thereof, or in the employ of such company or corporation," service of a copy thereof upon the conductor who has charge of a cattle train at the point in question on a short branch line, was not such a service on his railroad company as will be deemed "complete and effectual."

Railroad Operated by Receivers—Service upon Their Depot Agent.—And when a railroad is in the possession of and being operated by receivers duly appointed, and a suit, is brought against such receivers, a service of the summons and complaint upon an agent of the receivers, who was at the time in charge of a depot of the railroad, is not sufficient to give the court jurisdiction of the defendants. *Ex parte Charles*, 106 Ala. 203, 18 So. 73.

6. Ticket Agent.

A ticket agent of a railroad company is a proper person to accept service against the company under some statutes. *Dinzy v. Illinois Cent. R. Co. (C. C.)*, 61 Fed. Rep. 49; *Woodcock v. Baltimore, etc., R. Co. (C. C.)*, 107 Fed. Rep. 767; *Missouri, etc., Ry. Co. v. Crowe*, 9 Kan. 496; *Grand Trunk Ry. Co. v. Wayne Circuit Judge*, 106 Mich. 248, 69 N. W. 17; *Turner v. St. Clair Tunnel Co.* 102 Mich. 564, 61 N. W. 72; *Douglass v. Kanawha, etc., Ry. Co.* 44 W. Va. 267, 28 S. E. 705.

Ticket Agent Not Employed on Line of Road.—In *Woodcock v. Baltimore, etc., R. Co. (C. C.)*, 107 Fed. Rep. 767, it is held that if the service of summons in an action against a railroad company appears to have been made upon a regular ticket agent of defendant, it is sufficient, and he need not be employed on the line of the road to be regarded as such.

Local Ticket Agent in County of Suit as "Chief Officer or Agent."—In *Chesapeake, etc., R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990, it is held that a non-resident corporation operating a railroad in

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Kentucky was properly summoned by service of process on its local ticket agent in the county in which the suit was brought, he being the only agent of the carrier in the county, and the chief and managing agent of the department of which he had control, and, therefore, "the chief officer or agent" in the county, within the meaning of subsection 3 of section 51 of the Code of Kentucky.

Agent of Union Depot Company as Ticket Agent of Railroad.—In *Union Pac. Ry. Co. v. Novak* (C. C. A.), 61 Fed. Rep. 573, it appeared that a person served with process as ticket agent of a railroad company made affidavit that he was not an agent of the railroad company, but was an agent of a Union Depot company, and, as such, sold such tickets as the depot company furnished him. It was held that the reasonable inference was that if the depot company gave him tickets of the railroad company, he would sell them, and, in the absence of a clear statement of his position and duties, it was not error to hold that he was a ticket agent of the railroad company, upon whom service may be made.

Advertised as Commercial Agent and Authorized to Sell Passenger Tickets from Office in State.—Plaintiff brought suit in B. county against a foreign railroad corporation, and citation was served upon M. as its local agent in the county. Defendant filed a plea in abatement, sworn to by M., denying that it had an agent in B. county, and declaring that M. was simply authorized to solicit shipments of freight over its line. The proof showed not only that defendant advertised M. as its commercial agent, but that he had an office in B. county, from which he was authorized to sell tickets over its road. It was held that the plea was not well taken. *Shane v. Mexican Int. Ry. Co.* 8 Tex. Civ. App. 441, 28 S. W. 456.

Construction of Statutes.—3 How. Stat. § 8137, which provides that a summons or a copy of the declaration in any suit against a corporation shall be served on its presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, and 3 How. St. § 8147, which provides for service of process in suits against railroad companies upon any station agent or ticket agent at any station or depot along the line or at the end of the railroad of such company, both apply to the service of process upon railroad companies, it being intended by section 8137 to extend, rather than restrict, such service. *Turner v. St. Clair Tunnel Co.*, 102 Mich. 564, 61 N. W. 72.

Statute Applicable to Domestic Corporations Only.—In *Grand Trunk Ry. Co. v. Wayne Circuit Judge*, 106 Mich. 248, 69 N. W. 17, it is held that 3 How. St. § 8147, which provides that in an action against any railroad company "in this State," process may be served upon a station agent or a ticket agent of the company, applies to domestic corporations only. See also *Reath v. Western Union Tel. Co.*, 89 Mich. 22, 50 N. W. 817.

Representative—Ticket Agent.—But a ticket agent is not a representative of his railroad company within the designation of the

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eighteenth section of the Justice's Court act of New Jersey, he not being its president, treasurer, cashier, clerk, director, or one of its managers. *Pennsylvania R. Co. v. Kreitzman*, 57 N. J. L. 60, 29 Atl. 587.

7. Local Agent for County.

Under some statutes, service may be made upon the agent of a railroad for the county in which the action is brought. *Ex parte St. Louis, etc., Ry. Co.* 40 Ark. 141; *Missouri, etc., Ry. Co. v. Crowe*, 9 Kan. 496; *Nelson, etc., Co. v. E. Rehkopf & Sons (Ky.)*, 75 S. W. 203; *Katzenstein v. Raleigh, etc., R. Co.* 78 N. Car. 286; *El Paso, etc., Ry. Co. v. Kelly (Tex. Civ. App.)*, 83 S. W. 855; *G., H. & S. A. Ry. Co. v. Gage*, 63 Tex. 568; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323; *Missouri Pac. Ry. Co. v. Collier*, 62 Tex. 318; *Shane v. Mexican Int. Ry. Co.* 8 Tex. Civ. App. 441, 28 S. W. 456; *Westinghouse, etc., Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324.

Notice of Taking of Depositions—Local Agent.—Service upon the local agent of a railroad corporation of notice of taking of depositions is a good legal service. *Missouri Pac., etc., Ry. Co. v. Collier*, 62 Tex. 318.

Passenger or Freight Agent Nearest County Seat, though in Another County—Construction of Statute.—But in an action against a railroad company upon a contract to carry property, service of process is properly had upon the defendant's agent nearest the county seat of the county in which suit is brought, although in another county; section 73, Ky. Civil Code providing that "if a defendant operate a railroad it may be served upon defendant's passenger or freight agent at, or nearest to, the county seat of the county in which the action is brought. *Nashville, etc., Ry. Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177.

Upon Agent of Railroad Residing in Another County.—And in action against a railroad company on a contract of shipment may be properly brought in the county where the contract was made; and in such action service of process may be made upon an agent of the company living in another county. *Nashville, etc., Ry. Co. v. Mattingly (Ky.)*, 11 Am. & Eng. R. Cas., N. S., 736.

General Passenger Agent for State.—Subdiv. 21, article 1198, Tex. Rev. Sts., providing that suits against any private corporation, etc., may be commenced in any county where the cause of action arose, etc., or in which such corporation or company has an agent or representative, applies to suits against railroad companies; and a general passenger agent for the state, having an office in a county other than the one through which the road runs, is such an agent as is contemplated by such statute, and service upon him will bind his company. *St. Louis, etc., Ry. Co. v. Traweck*, 84 Tex. 65, 19 S. W. 370.

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8. Conductor.

An Indiana statute provides that summons against a railroad, in an action for killing live stock on tracks, may be served upon the conductor of any train passing through or into the county where the accident occurred. *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571; *New Albany, etc., R. Co. v. Grooms*, 9 Ind. 243; *Fowler v. Detroit & M. Ry. Co.* 7 Mich. 79.

Conductor on Any Train Passing into or through County.—Service of summons on a railroad company is had in compliance with the statute, Ind. R. S. 1881, section 4027, when a copy of the summons is delivered to a conductor on any train of the road passing into or through the county. *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571.

9. Conductor Not an Agent.

But a railroad conductor is not an agent of his company within the meaning of statutes providing for service of summons upon the "agent" of the corporation in an action against it. *Louisville, etc., R. Co. v. Thompson*, 62 Ind. 87.

10. Common Agent of Several Companies.

The common agent of several railroad companies is not such an agent of one of the companies as to render service of process upon him binding upon defendant, in an action against one of the companies, under statutes providing for service upon an agent of defendant in such an action. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Kingsley v. Great Northern R. Co.*, 91 Wis. 380, 64 N. W. 1036.

Upon Common Agent of Two Corporations.—The issuance of a summons against one corporation, is not the commencement of a suit against another distinct corporation, though served upon a person who was the common agent of both. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

Freight Agent of Combination Not Agent of Constituent Company.—A freight agent of a combination of several railroad companies for securing and sharing freights is not an agent of one of such companies separately so that summons in an action against such company could be served upon him. *Kingsley v. Great Northern Ry. Co.* 91 Wis. 380, 64 N. W. 1036.

Agent Nearest to County Seat—Action against Terminal Carrier—Service on Agent of Initial Carrier.—Ky. Civ. Code Prac. § 51, Subsecs. 3, 4, provides that, if defendant operates a railroad, summons may be served on its passenger or freight agent stationed at or nearest to the county seat of the county where suit is brought. It was held that the phrase "passenger or freight agent," etc., refers to a person in the service of defendant, and stationed by it at some point, and hence, in an action against the last of several connecting carriers by a shipper for negligence in transporting goods, service

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on the agent of the first carrier is insufficient. *Louisville & N. R. Co. v. Chestnut & Bro.* 115 Ky. 43, 7 R. R. R. 252, 30 Am. & Eng. R. Cas., N. S., 252, 72 S. W. 351.

Person Soliciting Business, and Routing it Over Connecting Line of Foreign Company.—The fact that a person solicited freight and passenger business, routing it over the connecting line of a foreign railroad company, as he did over all other lines connecting with the companies by whom he was employed, did not make him an agent of such foreign company on whom process might be served within Ballinger's Ann. Code & St. § 4875, where all the contracts were issued as the contracts of one or the other of the latter companies, to whom he alone reported, and they, in turn, arranged the division of the charges made with the connecting lines upon an agreed basis. *Arrow Lumber, etc., Co. v. Union Pac. R. Co.*, 53 Wash. 629, 35 R. R. R. 14, 58 Am. & Eng. R. Cas., N. S., 14, 102 Pac. 650.

In Charge of Joint Railroad Warehouse—Action against Company Merely Using Warehouse.—In *Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 S. Ct. 859, it is held that a person in charge of a joint railroad warehouse in a railroad centre in Texas, the property of one of several railroad companies which unite in bearing the expense of maintaining it, and in selecting its employees and in controlling its expenses, who makes no contract and handles no moneys on behalf of another railroad centering there, but not participating in the selection of such warehouse employees and in controlling expenses, and who is not on the pay-roll of the latter company, is not its "local agent" upon whom process may be served, under Sayles Rev. Civ. St. art. 1223a.

Ticket Agent at Union Depot as "Acting Ticket Agent" of Railroad Company—Hired and Controlled by Union Depot Company.—But in *Hillary v. Great Northern Ry. Co.* 64 Minn. 361, 67 N. W. 80, it is held that the ticket agent of a Union Depot, was an "acting ticket agent" of defendant railroad company, within the meaning of Minn. G. S. 1894, § 5202, providing for the service of process in civil actions upon railroad companies. In this case it is said in the opinion: "While the ticket agent is hired by, and under the control of, the Union Railway Company, yet he is performing all the duties of a ticket agent of the defendant, and the defendant is availing itself of his services for that purpose. The work 'acting' must have been used in the statute for a purpose, and it seems to us that the essential thing, under the statute, is not the existence of a contract of service, but the actual performance of the duties of the ticket agent of the railroad company."

Same Agent Employed by Foreign and Domestic Companies to Solicit Business—Portion of Salary Collected from Foreign Company.—Two connecting carriers, one a foreign and the other a domestic corporation, employed the same agent in the state to solicit business. His office was maintained jointly by both companies in a building in which were located the offices of the domestic corpora-

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tion. He was under the immediate direction of the domestic corporation, by whom his salary was paid in the first instance, though a portion of it was afterwards collected from the foreign corporation. He did not issue bills of lading, but quoted rates, and directed shippers to the offices of the domestic corporation, where bills of lading were issued and the whole charge for transportation over both lines collected. It was held that under Md. Code Pub. Gen. Laws 1904, art. 23, § 411, authorizing service upon any agent of a foreign corporation holding and exercising franchises within the state, service of the process upon the soliciting agent of the foreign corporation was sufficient to render it amenable to an action in personam within the state. *Central of Georgia Ry. Co. v. Eichburg* (Md.), 27 R. R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356, 68 Atl. 690.

Agent for All Railroad Companies of System—Action against Constituent Company.—The Union Pacific Railway Company, having formed a combination, under the name of the "Union Pacific System," with various other companies, including the Oregon Short Line Company, which operates a railroad in Washington, and being engaged in making contracts therein for freight and passenger service under the name of the system, must be considered as doing business in that state, and a service of summons upon an agent therein, who is authorized to act for all the companies of the system, is a service upon such corporation. *Van Dresser v. Oregon, etc., Nav. Co.* (C. C.), 48 Fed. Rep. 202.

Foreign Railroad Doing Business in State through Local Company—Service upon Officers of Latter.—A foreign railroad corporation extended its road into Texas through a company chartered by the state. The companies then entered into a traffic agreement to establish through lines connecting all points on both lines where feasible, and to operate such lines as if owned by one corporation. The foreign company bound itself to purchase all the bonds of the local company. The companies contracted as to all traffic which might be transported with reasonable directness over the road of either party, prorating the rates on the bases of mileage covered by the traffic in transportation. The books of one company were to be opened to the inspection of the other, and the foreign company was to furnish all equipments for operating the local railroad, receiving the compensation usually allowed therefor. The agreement was for 999 years. The evidence showed that the foreign company owned the majority of the local company's stocks and bonds; that the officers of the local company were the general attorney and other employees of the foreign company; that the local company owned no rolling stock, and operated no trains which did not pass beyond the limits of the state on the foreign company's road; and that its agents and employees were considered agents and employees of the foreign company on crossing the state line. It was held that the foreign company was doing business in the state through the local company as its representative, and liable to a suit for personal injury sustained

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in another state by a non-resident of both states on service of process on the officers of the local company. *Buie v. Chicago, etc., Ry. Co.*, 95 Tex. 51, 2 R. R. R. 556, 25 Am. & Eng. R. Cas., N. S., 556, 65 S. W. 27.

11. Ticket Agent of One Company Selling Tickets for Another Company.

It has been held that the ticket agent of one railroad company, when selling the tickets of another, or joint tickets, good over his own company's part of the route, and that part of it where the transportation is over the railroad of another company, is not an agent of the latter, so as to make service of summons upon him binding upon such company. *Central of Georgia Ry. Co. v. Eichburg (Md.)*, 27 R. R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356, 68 Atl. 690; *Doster v. Ft. Worth, etc., Ry. Co.*, 49 Tex. Civ. App. 47, 107 S. W. 579.

Ticket Agent Selling through Joint Ticket Not Ticket Agent of Foreign Company.—Where a foreign railroad company does not own or operate a railroad within Minnesota, but its cars are brought into the state by another railroad company under some joint traffic arrangement, a ticket agent of the later company, who sells through joint tickets over the local line within the state and also over the foreign line beyond the state, is not a "ticket agent" of the foreign company upon whom service of process may be made, as provided by section 4110, Minn. Rev. Laws 1905. *Slaughter v. Canadian Pac. Ry. Co.*, 106 Minn. 263, 33 R. R. R. 79, 56 Am. & Eng. R. Cas., N. S., 79, 119 N. W. 398.

12. Agent Soliciting Business for Railroad.

There are decisions to the effect that one employed by a domestic railroad corporation merely to solicit within the state freight or passenger business for its road is, nevertheless, the company's agent, within the meaning of a statute providing for service of summons upon any agent of a railroad company. *Denver, etc., R. Co. v. Roller (C. C. A.)*, 18 Am. & Eng. R. Cas., N. S., 595; *Maxwell v. Atchison, etc., R. Co. (C. C.)*, 34 Fed. Rep. 286; *Wall v. Chesapeake, etc., Ry. Co. (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 413; *Central of Georgia Ry. Co. v. Eichberg (Md.)*, 27 R. R. R. 356, 50 Am. & Eng. R. Cas., N. S., 356, 68 Atl. 690.

13. Same—Contrary View.

But for decisions to the contrary, see *Booth v. Gamble-Robinson, etc., Co.* 139 Cal. 175, 72 Pac. 908; *Booz v. Texas, etc., Ry. Co. (Ill.)*, 41 R. R. R. 607, 64 Am. & Eng. R. Cas., N. S., 607; *North Wisconsin Cattle Co. v. Oregon, etc., R. Co. (Minn.)*, 30 R. R. R. 55, 53 Am. & Eng. R. Cas., N. S., 55, 117 N. W. 391; *Chicago, etc., R. Co. v. Walker*, 16 Am. & Eng. R. Cas. 553, 9 Lea (77 Tenn.), 475; *Pennsyl-*

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vania R. Co. *v.* Rogers, 52 W. Va. 450, 7 R. R. R. 413, 30 Am. & Eng. R. Cas., N. S., 413, 44 S. W. 300.

Passenger Agent Employed to Effect Compromise.—In *Maxwell v. Atchison, etc., R. Co. (C. C.)*, 34 Fed. Rep. 286, it is held that in an action against a railroad corporation of another state, service of process cannot be made upon a passenger agent whose sole duty is to solicit travel for the defendant's road, notwithstanding he may be employed to effect a compromise of plaintiff's claim.

Mere Authority to Solicit Business—Desk Room in Office of Other Companies.—In *Fairbank & Co. v. Cincinnati, etc., Ry. Co.*, 4 C. C. A. 403, 54 Fed. Rep. 420, it is held that under Ill. Rev. St. 1891, c. 110, § 5, which provides that in suits against corporations, in the absence of the president, summons may be served on any agent of the company found in the county, does not authorize service of summons against a foreign railroad corporation upon persons employed by it for the sole purpose of soliciting business for the company, without authority to sell tickets or make contracts for the company, even though such company supplies them with desk room in an office occupied in part by other companies, upon the window of which the company's name is painted.

Upon Any Agent Found in County—Soliciting Agent of Foreign Railroad.—The statute of Illinois in question, providing for service of process against corporations upon any agent of a corporation found in the county, in the absence of the president, does not authorize service against a foreign railroad company upon a person employed merely to solicit business in the state for the company's road. *Wall v. Chesapeake, etc., Ry. Co. (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 413.

"Freight Solicitor" of Foreign Railroad.—But a return of service of summons on a named person as "freight solicitor," of defendant, in charge of its business office at the time, is sufficient to show that the person served was the agent of the defendant foreign corporation, under section 2017 Mo. R. S. 1889. *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965.

Agent in Charge of Office within State.—And in *Block v. Atchison, etc., R. Co. (C. C.)*, 21 Fed. Rep. 529, it is held that where a railroad corporation organized, and having its road in one state, has an office in another for the purpose of soliciting business, and has an agent in charge of such office, employed for the purpose of furthering the business of the company in the state in which its road runs, it may be sued in the district where such office is located, and service of process upon the agent in charge of such office is valid.

Soliciting Agent of Foreign Railroad—Entire Line in Foreign State.—And under section 411 of the Code of Civil Procedure of California, providing that "The summons must be served by delivering a copy thereof as follows: * * * (2), if the suit is against a foreign corporation, doing business and having a managing or business agent, cashier or secretary within this state, to such agent, cashier

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or secretary," where the action is against a foreign railroad corporation having a business office in the state, and a managing agent in charge of the office, for the purpose of soliciting business in transporting passengers and freight over its road, situated in another state, valid service may be made upon such agent. *Denver, etc., R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595.

14. Lessee.

The lessee of a railroad company is its agent so as to make the service of summons upon the lessee binding upon the lessor company. *Slaughter v. Canadian Pac. Ry. Co.*, 106 Minn. 263, 33 R. R. R. 79, 56 Am. & Eng. R. Cas., N. S., 79, 119 N. W. 398; *Van Dresser v. Oregon, etc., Nav. Co.* (C. C.), 48 Fed. Rep. 202.

Lessor "The Leasing Company"—President.—Under the provisions of § 3369 (a) of the Code of Georgia, for perfecting service on a railroad company which has leased its line by sending a letter "to the president of the leasing company," and serving the depot agent of the lessee, the lessor is "the leasing company," and the letter should be sent to its president. *Atlanta & C. A. L. Ry. v. Harrison & Bro.*, 76 Ga. 757.

Statute Applicable Where Company Permits Another to Operate Its Railroad Not Applicable to Receivership.—But Ala. Acts 1886-87, p. 6, providing that, whenever a railroad corporation has permitted its road to be used or operated by any other person or corporation, it is sufficient service of process in any suit against such person or corporation to serve a copy of such process on any depot agent, or person in charge of any depot along the line of the railroad so used and operated, has no reference to compulsory dispossession of a company of its railroad, as when the possession is transferred to receivers. *Ex parte Charles*, 106 Ala. 203, 18 So. 73.

Stock Killing Cases—Notice of Claim—Provision Not Applicable to Lessees.—And in *Wright v. Gossett*, 15 Ind. 119, it is held that Ind. Acts 1853, p. 113, which provides that, in an action for compensation for animals killed or injured by cars, or locomotives, the justice of the peace before whom such action is prosecuted, "shall cause at least ten days notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing through said county," is confined to actions against the corporation; and service of process will not, when there is no appearance, authorize a judgment against individuals, although they may represent themselves to be lessees, and to have charge of the rolling stock of the road.

15. Lessee's Agent Not Agent of Lessor.

But an agent of the lessee of a railroad is not an agent of the lessor company for the purpose of accepting service for the latter. *Perry v. Brunswick & W. Ry. Co.*, 119 Ga. 819, 47 S. E. 172; *Chicago, etc., R. Co. v. Suta*, 123 Ill. App. 125; *Chicago, etc., R. Co. v. Weber*,

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219 Ill. 372, 76 N. E. 489; *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292; *Harrow v. Ohio River R. Co.*, 38 W. Va. 711, 18 S. E. 926.

Action against Lessor—Agent of Lessee.—The fact that a lessor railroad is liable for the negligence of the lessee railroad and its servants in operating the railroad, does not render the lessee and its servants agents of the lessor for the purpose of accepting service of process; and service of process on an agent of the lessee is not legal service upon the lessor. *Chicago, etc., R. Co. v. Weber*, 219 Ill. 372, 76 N. E. 489.

Same—Statute Making Lessor Liable for Claims against Lessee.—In *Perry v. Brunswick, etc., Ry. Co.*, 119 Ga. 819, 47 S. E. 172, it is held that the Georgia act of Dec. 20, 1899, providing that in certain cases railroad companies which have leased their property or lines of railroad may be held liable for claims against the lessee, does not contemplate that service upon the agent of the lessee will amount to service upon the lessor.

Action against Foreign Lessor—Copy of Summons Left at Depot in Charge of Agent of Lessee.—A railroad company was organized in Kansas, after which it built a line of road in the state. When the road was built the company leased and surrendered possession of the same, together with all other property owned by it, to another company for a period of 40 years. After the lease was extended it never operated a railroad nor held any business relations in the state, except as lessor of such railroad. An action was brought against the foreign company, and a certified copy of the summons was served by leaving a copy thereof at the depot of the leased line, which was in charge of an agent of the lessee company, who had no connection with the lessor. It was held that the service was insufficient. *LeRoy, etc., R. Co. v. Sidell*, 62 Kan. 349, 21 Am. & Eng. R. Cas., N. S., 741, 63 Pac. 599.

Individual Lessee—Depot Agent.—And leaving a copy of a declaration and process with a depot agent is not sufficient service on an individual lessee of the railroad, although such service might be good upon a railroad corporation under the same circumstances. *Jones v. Georgia, etc., R. Co.*, 66 Ga. 558.

Action against Lessee—Leaving Copy at Office of Superintendent in County of Principal Office of Lessor and Lessee.—Under Ga. Code, § 3407, which provides that the lessee of a railroad shall be liable to suit of any kind in the same court or jurisdiction as the lessor, before the lease, service of summons in an action against a lessee railroad company by leaving a copy at the office of the superintendent in the county in which the declaration alleges were and are situate the principal officers of the lessor and lessee is good. *Hills v. Richmond, etc., R. Co. (C. C.)*, 37 Fed. Rep. 660.

Lessee as Agent of Lessor Railroad.—But in *Van Dresser v. Oregon, etc., Nav. Co. (C. C.)*, 48 Fed. Rep. 202, it is held that when a domestic corporation owning a railroad in the state leases it to

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another company without the authority or consent of the state, and receives a revenue under the lease, its lessee must be considered as its agent to carry on the business, and in an action for a tort committed in operating the road, service of summons upon the agents of the lessee is service upon the lessor company.

16. Receiver's Agent.

It has been held that where the action is against a railroad corporation in the hands of a receiver, and not against the latter, service upon an agent of the receiver will not confer jurisdiction over the company. *Cherry v. North, etc., R. Co.*, 59 Ga. 446; *Heath v. Missouri, etc., R. Co.*, 83 Mo. 617.

Railroad Seized for Non-Payment of Interest on Bonds Indorsed by State.—For service of process upon a railroad corporation to be effective by reason of service upon an agent, the agent must, at the time of the service, be its agent. An agent of the state, such as a receiver who has possession of the road in consequence of a seizure by the governor for non-payment of interest on bonds which the state has indorsed, is not the agent of the corporation. *Cherry v. North, etc., R. Co.*, 59 Ga. 446.

Agent of Receivers of Foreign Corporation.—But under Colo. Code, section 37, service of summons upon the agent of the receivers of a foreign corporation is sufficient, though the action is against the corporation itself. *Ganebin v. Phelan, Imple, etc., Co.*, 5 Colo. 83.

Managing Agent Retained in Office by Receivers.—So in *Faltiska v. New York, etc., R. Co.*, 12 N. Y. Misc. 478, 33 N. Y. Supp. 679, it is held that a managing agent of a railroad corporation, upon whom service of process may be made, does not cease to be such by the appointment of temporary receivers of the company and his retention in office by them, so long as his original appointment is not revoked by the company.

Station Agent Retained by Receiver.—And in *Simpson v. East Tenn., etc., R. Co.*, 89 Tenn. 304, 15 S. W. 735, it is held that a suit against a railroad corporation will not be abated upon its plea averring that the suit had been brought after the road had passed into the hands of a receiver, and that process had been served upon a station agent of the receiver, where it appears that such agent had been originally employed by the company, and continued in the same service under the receiver.

Depot Agent of Branch Line as Agent of Corporation—Also Employed by Receivers.—And in *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219, it is held that where the receiver of a foreign railroad corporation operating a connecting line in Georgia as part of a through line, under a contract by which they were to operate the Georgia branch under the laws of Georgia, furnish their own rolling stock, for which the Georgia road should pay a certain amount, and each road should contribute its proportion of the expenses, and

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the net proceeds should be divided pro rata, a depot agent on the line of the Georgia corporation was such a agent of that company as could be served with process against it, though he might have been employed by the receivers and made remittances to them, by whom the proceeds were afterwards distributed under the contract.

Action against Receivers—Local Agent of Railroad.—So in *Farris v. Receivers of Richmond & Danville R. Co.*, 115 N. Car. 600, 20 S. E. 167, it is held that an action against the receivers of a corporation is, in fact, an action against the latter, and therefore, under section 217 of N. Car. Code, service of summons in such an action upon a local agent of the company is service on its receivers.

17. Railroad's Agent Working for Its Receivers.

Where a railroad is in the hands of a receiver, and the company's agents continue to work under the receiver, in an action against the receivership process may be served upon one of such, agents, and it will be sufficient to bring the receiver into court. *Louisville, etc., R. Co. v. Cauble*, 46 Ind. 277, 6 Am. Ry. Rep. 349; *Proctor v. Missouri, etc., Ry. Co.*, 42 Mo. App. 124; *Grady v. Richmond, etc., R. Co.*, 116 N. Car. 952, 21 S. E. 304; *State v. Port Royal, etc., R. Co.*, 84 Fed. Rep. 67; *Simpson v. East Tenn., etc., R. Co.*, 89 Tenn. 304, 15 S. W. 735; *Farris v. Receivers of Richmond, etc., R. Co.*, 115 N. Car. 600, 20 S. E. 167.

18. Miscellaneous.

Section Foreman as "Local Superintendent of Repairs."—The service of summons against a railroad company upon its section foreman, as "a local superintendent of repairs," where it appears that the company has not designated any person or officer upon whom service could be made under the provisions of § 680 of the civil code of Kansas, is a valid service upon the company. *St. Louis, etc., Ry. Co. v. DeFord*, 38 Kan. 299, 16 Pac. 442.

Criminal Prosecution—Officers or Agents.—In *State v. Western, etc., R. Co.*, 89 N. Car. 584, 22 Am. & Eng. R. Cas. 58, it is held that the proper mode of bringing into court a railroad corporation charged with a criminal offense is by service of a copy of the summons upon one of its officers or agents.

"Engineer" Includes Locomotive Driver—New Jersey Statute.—Section 88 of the New Jersey corporation act authorizes service of process to be made upon foreign corporations by serving an "officer, director, agent, clerk, or engineer" thereof. It was held that the word "engineer" includes a railroad locomotive driver. *Devere v. Delaware, etc., R. Co. (C. C.)*, 60 Fed. Rep. 886.

Track Master Neither Officer Nor Clerk.—A track master of a railroad company is neither an officer nor a clerk, engaged in the active management of the ordinary business of the company, within the meaning of section 1727 of the Code of Iowa, nor a president or

Note

secretary, as provided in section 17 of the act entitled "An act granting to railroad companies the right of way," approved Jan. 18, 1853. *Richardson v. Burlington, etc., R. Co.* 8 Iowa, 260.

Advertised as Defendant's "General Agent"—Salary Paid by Other Railroads and All Contracts Issued by Them.—The mere fact that a person was known and advertised as the "general agent" of a foreign railroad company did not make him an agent of the company upon whom process might be served within Ballinger's Ann. Code & St. § 4875, where the company had no interest in the office in which he was, or control over it, and his salary was paid by other companies, and all freight and passenger contracts issued by them. *Arrow Lumber, etc., Co. v. Union Pac. R. Co.*, 53 Wash. 629, 35 R. R. R. 14, 58 Am. & Eng. R. Cas., N. S., 14, 102 Pac. 650.

Proceeding against Vendor—Service of Process upon Ticket Agent of Vendee.—In *Thomson v. McMorran Milling Co.*, 132 Mich. 591, 94 N. W. 188, it is held that in a legal proceeding against a railroad company which has sold all its property to another company, service of process upon a ticket agent of the purchasing company does not confer jurisdiction, though he was formerly agent for defendant.

Merely Having Desk Room in Railroad's Office.—In *Heitzell v. Kansas City, etc., R. Co.*, 77 Mo. 482, it appeared that a party seeking to enforce a lien against a railroad for materials furnished in its construction, in the absence of all the officers of the company, caused a notice of his claim to be served on a person who had desk room in the office of the company, but no connection with its affairs. It was held that this was not service upon the company, and did not, therefore, fulfill the requirements of section 3203, Mo. R. S., which makes the service of such notice upon the company an essential prerequisite to a lien.

A. R. Y.

MERWIN v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Washington, June 1, 1912.)

[123 Pac. Rep. 1019.]

Railroads—Crossing Accidents—Contributory Negligence — Jury Questions.—In an action against a railroad company for injury to a teamster at a street crossing, where he was struck by a train, whether he was guilty of contributory negligence held, under the evidence, a jury question.

Railroads—Crossing Accidents — Contributory Negligence. — A teamster was not chargeable with knowledge that a train was approaching a street crossing at an excessive speed, unless he had actual knowledge, or knew such facts as would lead a reasonably prudent man to discover such negligence.

Railroads—Crossing Accidents — Contributory Negligence. — A teamster at a street crossing was not chargeable with knowledge that a train was approaching at an excessive speed, because he had seen other trains run over the crossing at high speed.

Railroads—Ordinances—Knowledge—Presumptions.—As affecting a teamster's rights at a street crossing, it will be presumed that he knew of an ordinance limiting the speed of trains over the crossing.

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by James Merwin against the Northern Pacific Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for appellant.

Governor Teats, Hugo, Metzler, Leo Teats, and Ralph Teats, all of Tacoma, for respondents.

PARKER, J. [1, 2] This is an action to recover damages for personal injuries which the plaintiff alleges resulted to him from the negligence of the defendants, railway company and Hayes, its locomotive engineer, in the operation of one of its trains in approaching the crossing of Spinning street, in the city of Puyallup. The defendants denied the negligence charged against them, and also alleged that the plaintiff's injuries resulted from his own carelessness and contributory negligence. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

Spinning street, in Puyallup, crosses the tracks of the railway at right angles at a point some distance east of the depot. At this crossing, there are two main line tracks; the north one being used by the west-bound trains, and the south one by the east-

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bound trains. Immediately to the south, there is another track, running parallel with the main line tracks from the depot east for a distance of about one mile beyond this crossing, where it leaves the main line. This is a branch line track, and is used by trains running to Carbonado. The distance between the main line tracks is 9 feet and 10 inches; and the distance between the branch track and the south main line track is 7 feet and 10 inches. This crossing was being extensively used by the public on the day of respondent's injury, and for some time prior thereto, which fact was known to appellant Hayes, the engineer. On January 2, 1911, respondent was employed as a teamster for a paving company having its plant near the crossing, and immediately to the north of the railway tracks. He was then hauling paving material from the plant south across the railway tracks, where street paving was progressing. On returning to the plant during the forenoon of that day, after delivering a load of street-paving material, as he approached the railway tracks from the south, he stopped his team at the crossing, with the horses' heads about 8 feet from the most southerly track, in order to await the passing of a Carbonado passenger train, which he noticed approaching from the west. This train was running about six or seven miles per hour. When he had stopped, and just before the train passed over the crossing, he looked to the east along the tracks, and could then see a distance of from 1,500 to 2,000 feet, and would have been able to see a train approaching from the east upon any of the tracks, if such train had then been within that distance of him. His purpose was to ascertain whether or not he could safely proceed across the tracks, so far as the approach of any trains from the east was concerned. When the Carbonado train had passed over the crossing, he immediately proceeded on his way; and when the horses' heads had reached the west-bound main track he saw a passenger train, a few hundred feet to the east, approaching him at a high rate of speed upon that track. He was then in such a position with his team and wagon that his safest course was to proceed, which he did by urging his team forward; but before the rear end of his wagon passed entirely over the west-bound track it was struck by the west-bound train, throwing him from the wagon, and resulting in the injuries for which he now seeks recovery. Two witnesses for respondent, one of whom had considerable railway experience, plainly saw the train, and estimated its speed at 35 to 40 miles per hour. Appellant Hayes, the engineer in charge of the engine, estimated its speed at about 20 miles per hour. At that time, there was in force in the city of Puyallup an ordinance restricting the speed of trains within the city of Puyallup to 20 miles per hour. There is no direct evidence as to respondent's actual knowledge of the existence of this ordinance. He testified that he had sometimes seen trains

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pass over this crossing which he judged were going 40 miles per hour. The eastern boundary of the city is about three-fourths of a mile east of this crossing, so that the west-bound train ran that distance within the city limits before reaching the crossing. If respondent had waited after the passing of the Carbonado train until it had run its length, or a little more, being about 300 feet, he could have seen along the tracks to the east a sufficient distance to observe the approach of the west-bound train in time to have avoided being injured by waiting until it passed. He says he heard no whistle from the west-bound train, though he claims to have not only looked for the approach of such a train immediately before the passing of the Carbonado train, but also listened for the whistle of a west-bound train after the passing of the Carbonado train, while it shut off his view to the east. He claims to have been particularly cautious in this regard, because he appreciated that it was a dangerous crossing. Appellant Hayes, the engineer, says he sounded the whistle on approaching the crossing. These facts are in the main not seriously in dispute, except as we have indicated.

It is first contended that the trial court erred in denying appellants' motion for a nonsuit and for a directed verdict. It is not contended that the evidence was insufficient to carry the case to the jury upon the question of the appellants' negligence—indeed, we cannot see how it could be seriously so contended; but it is insisted that the evidence so conclusively shows respondent to be guilty of contributory negligence that the trial court should have so decided as a matter of law, and instructed the jury accordingly. We are unable to agree with this contention. It may be conceded that the evidence is such as to furnish strong ground for argument in support of the contention that respondent's negligence materially contributed to his injuries; but we cannot say that there is no room for honest difference of opinion upon that subject. This makes it a question for the jury. It seems to us reasonable minds might honestly differ as to whether or not respondent pursued such a course as an ordinarily prudent person would under the circumstances. He stopped before reaching the first track; and while there looked east where he could see for such a distance that he might well conclude that no train running at a reasonable rate of speed, in view of its approach to the crossing and the fact that the crossing was extensively used and within the city limits, would reach the crossing before he could drive safely over it by proceeding immediately after the passing of the Carbonado train. It seems probable that, had the west-bound train been running within the ordinance speed limit, respondent would have passed over the west-bound track, upon which it was running, before it reached the crossing. Assuming that appellants were negligently running the train at an excessive rate of speed, of which there was ample evidence war-

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ranting the jury in so believing, we cannot hold that respondent was required to notice or anticipate such negligence on the part of appellants, unless we can decide, as a matter of law, that the evidence conclusively shows that respondent had actual knowledge of such negligence, or that he had knowledge of facts such as would lead a reasonably prudent man to then anticipate or discover such negligence. We think the evidence did not warrant the court in so deciding, and that the question of respondent's contributory negligence was properly left to the jury. This is in harmony with our decision in *Richmond v. Tacoma Railway & Power Co.*, 122 Pac. 351, and our former decisions there reviewed.

[3, 4] The trial court gave certain instructions to the jury which are claimed to be erroneous, the substance of which is that, as the city ordinance limited the rate of speed of trains, the respondent could proceed on the assumption that the railway company would operate its trains in accordance therewith; and that it was not incumbent on him to anticipate the operation of a train in excess of the ordinance speed limit. It is argued that these instructions were erroneous, in view of the fact that respondent testified that he had sometimes seen trains running over this crossing which he judged were going 40 miles per hour, and also in view of the fact that there was no evidence as to his actual knowledge of the existence of such an ordinance. It seems to us that his mere statement that he sometimes saw trains running at that high rate of speed over this crossing would not require him to anticipate such a high rate of speed at this time. Had his statement shown that he had known of such continuous or frequent violations of the ordinance, it might be argued that he should have anticipated such a rate of speed; but the evidence on that question is too meager to warrant us in holding the instructions erroneous for that reason. It is insisted that, since there is no evidence showing respondent's actual knowledge of the existence of the ordinance, he was not entitled to assume that the trains would be operated at a speed not exceeding 20 miles per hour. We think, in the absence of any evidence of his actual knowledge upon that question, he will be presumed to have known of the existence of the ordinance. *Richmond v. Tacoma Ry. & Power Co.*, 122 Pac. 351, and cases there cited, support this view.

We find no error in the record, and therefore affirm the judgment.

DUNBAR, C. J., and CROW, GOSE, and CHADWICK, JJ., concur.

KANSAS CITY SOUTHERN RY. CO. et al. *v.* DREW.

(Supreme Court of Arkansas, April 29, 1912.)

[147 S. W. Rep. 50.]

Railroads—Accidents at Crossings—Negligence.*—Where it is shown that a traveler was injured in a collision by a train at a public crossing, a prima facie presumption arises that the railroad company was negligent.

Railroads—Accidents at Crossings—Relative Rights of Travelers and Railroad Company.†—At a railroad crossing, a railroad company and a traveler on the highway must use ordinary care, the former to avoid inflicting injury, the latter to avoid being injured; and the degree of care to be exercised by each is that which a prudent man would exercise under similar circumstances.

Trial—Accidents at Crossings—Instructions.—An instruction, in an action against a railroad company for injuries to a traveler at a cross-

*See foot-note of *Kearns v. Southern Ry. Co.* (N. Car.), 21 R. R. R. 848, 44 Am. & Eng. R. Cas., N. S., 848, where all the authorities in this series on the subject preceding it, are collected or referred to, see first paragraph of second foot-note of *Elliott v. New York, etc., R. Co.* (Conn.), 42 R. R. R. 715, 65 Am. & Eng. R. Cas., N. S., 715.

†For the authorities in this series on the subject of the degree of care required of trainmen to avoid injuring highway travelers at public crossings, see *St. Louis, etc., R. Co. v. Carr* (Ark.), 37 R. R. R. 92, 60 Am. & Eng. R. Cas., N. S., 92; *Gray v. Chicago, etc., R. Co.* (Iowa), 37 R. R. R. 420, 60 Am. & Eng. R. Cas., N. S., 420; *Wheatherly v. Nashville, etc., Ry.* (Ala.), 35 R. R. R. 759, 58 Am. & Eng. R. Cas., N. S., 759; foot-note of *Southern Ry. Co. v. Fisk* (C. C. A.), 31 R. R. R. 148, 54 Am. & Eng. R. Cas., N. S., 148, where all those preceding it are collected or referred to.

For the authorities in this series on the subject of the degree of care required of a highway traveler about to cross railroad tracks at a public crossing, see *Mississippi Cent. R. Co. v. Hanna* (Miss.), 40 R. R. R. 14, 63 Am. & Eng. R. Cas., N. S., 14; *Hoff v. Los Angeles-Pac. Co.* (Cal.), 39 R. R. R. 47, 62 Am. & Eng. R. Cas., N. S., 47; *Averbuch v. Great Northern Ry. Co.* (Wash.), 38 R. R. R. 79, 61 Am. & Eng. R. Cas., N. S., 79; *Clarke v. Connecticut Co.* (Conn.), 37 R. R. R. 375, 60 Am. & Eng. R. Cas., N. S., 375; *St. Louis & S. F. R. Co. v. Carr* (Ark.), 37 R. R. R. 92, 60 Am. & Eng. R. Cas., N. S., 92; *Donohue v. Portland Ry. Co.* (Ore.), 37 R. R. R. 66, 60 Am. & Eng. R. Cas., N. S., 66; *Cottle v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282; *Norfolk & P. T. Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; *Louisiana & A. Ry. Co. v. Ratcliffe* (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255; *Blodgett v. Central Vt. Ry. Co.* (Vt.), 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511; *Louisville & N. R. Co. v. Roth* (Ky.), 32 R. R. R. 610, 55 Am. & Eng. R. Cas., N. S., 610; *Grimm v. Milwaukee Elect. Ry. & L. Co.* (Wis.), 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665; *Denis v. Lewiston, etc., Ry. Co.* (Me.), 31 R. R. R. 516, 54 Am. & Eng. R. Cas., N. S., 516; *Chicago, etc., R. Co. v. Assman* (Kan.), 29 R. R. R. 354, 52 Am. & Eng. R. Cas., N. S., 354; *Louisville & N. R. Co. v. Ueltschi's Ex'rs* (Ky.), 21 R. R. R. 669, 44 Am. & Eng. R. Cas., N. S., 669; *Boyd v. St. Louis*

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ing, that railroad companies are charged with a high degree of care for the protection of travelers at public crossings, and it is their positive duty to keep a lookout for such travelers, and to use every reasonable precaution, consistent with the proper operation of their trains, to avoid injuring them, and, if the trainmen failed to exercise such care, the failure to keep such lookout was negligence, and if the traveler was injured by reason thereof, and without fault on his part, the verdict should be for him, when considered as a whole, was not prejudicially erroneous as imposing too high a degree of care on railroad companies; for the degree of care called for was only ordinary care.

Trial—Instructions—Invading Province of Jury.—Instructions should declare the law only; and judges must not charge with regard to matters of fact.

Railroads—Accidents at Crossings—"Negligence"—Failure to Give Statutory Signals.†—A railroad company must give the statutory signals when approaching a highway crossing, and a failure to do so is

S. W. Ry. Co. (Tex.), 29 R. R. R. 742, 52 Am. & Eng. R. Cas., N. S., 742; Louisville & N. R. Co. v. Taylor (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228; Southern Ry. Co. v. Winchester's Ex'x (Ky.), 26 R. R. R. 736, 49 Am. & Eng. R. Cas., N. S., 736; Chesapeake & O. Ry. Co. v. Wilson (Ky.), 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238; Norris v. New York, etc., R. Co. (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17; Cincinnati, etc., R. Co. v. Champ (Ky.), 27 R. R. R. 265, 50 Am. & Eng. R. Cas., N. S., 265; Chicago, etc., Ry. Co. v. Leachman (Ind.), 13 R. R. R. 775, 36 Am. & Eng. R. Cas., N. S., 775; Barnhill v. Texas & P. Ry. Co. (La.), 7 R. R. R. 7, 30 Am. & Eng. R. Cas., N. S., 7; Chesapeake & O. Ry. Co. v. Riddle (Ky.), 8 R. R. R. 77, 31 Am. & Eng. R. Cas., N. S., 77; Delaware, etc., R. Co. v. Devore (C. C. A.), 8 R. R. R. 56, 31 Am. & Eng. R. Cas., N. S., 56; Quinn v. Chicago & E. R. Co. (Ind.), 12 R. R. R. 661, 35 Am. & Eng. R. Cas., N. S., 661; Reed v. Queen Ann's R. Co. (Del.), 11 R. R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332; Louisville & N. R. Co. v. Mollo's Adm'x (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714; Thomas v. Central of Georgia Ry. Co. (Ga.), 18 R. R. R. 191, 41 Am. & Eng. R. Cas., N. S., 191; Heebe v. New Orleans & C. R. etc., Co. (La.), 11 R. R. R. 763, 34 Am. & Eng. R. Cas., N. S., 763; note, 12 Am. & Eng. R. Cas., N. S., 341; extensive foot-note of McGoran v. New York, etc., R. Co. (N. J.), 9 R. R. R. 367, 32 Am. & Eng. R. Cas., N. S., 367.

†See last paragraph of first foot-note of Illinois Cent. R. Co. v. Moss (Ky.), 40 R. R. R. 41, 63 Am. & Eng. R. Cas., N. S., 41; first foot-note of Arkansas, etc., Ry. Co. v. Graves (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259; foot-note of Western Ry. v. Moore (Ala.), 39 R. R. R. 67, 62 Am. & Eng. R. Cas., N. S., 67.

§See second foot-note of Elgin, etc., Ry. Co. v. Hoadley (Ill.), 22 R. R. R. 663, 45 Am. & Eng. R. Cas., N. S., 663, where all the authorities in this series on the subject preceding it, are collected; foot-note of Engleman v. Boston, etc., R. (Mass.), 42 R. R. R. 739, 65 Am. & Eng. R. Cas., N. S., 739; foot-note of Morgan v. Pere Marquette R. Co. (Mich.), 38 R. R. R. 59, 61 Am. & Eng. R. Cas., N. S., 59; first foot-note of Illinois Cent. R. Co. v. Moss (Ky.), 40 R. R. R. 41, 63 Am. & Eng. R. Cas., N. S., 41.

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“negligence,” within Kirby’s Dig. § 6595, providing that railroad companies are liable for damages caused by the omission to give statutory signals.

Railroads—Accidents at Crossings—Contributory Negligence.—A traveler approaching a railroad crossing may assume that the trainmen will not move the train over the crossing without giving the statutory signals.

Damages—Personal Injuries—Excessive Damages.—An able-bodied man 69 years old, able to perform manual labor of all kinds, sustained personal injuries confining him to bed 40 days. He spit up much blood for months after the injuries. After he got up, he tried to pick cotton, but could not do so. He stated that he could not raise his right arm at all. The testimony of his physicians substantiated his evidence as to his injuries. They treated him about two months, and charged him \$125 for services. Each testified that plaintiff’s elbow got stiff and required considerable attention, and they stated that his injuries were not permanent. Held, that a verdict for \$2,000 was not excessive.

Railroads—Accidents at Crossings—Negligence—Question for Jury.—Whether trainmen negligently operated a train striking a traveler at a crossing held, under the evidence, for the jury.

Railroads—Accidents at Crossings—Contributory Negligence—Question for Jury.—Whether a traveler, struck by a train at a crossing, was guilty of contributory negligence held, under the evidence, for the jury.

Appeal from Circuit Court, Sevier County; Jeff T. Cowling, Judge.

Action by Mike Drew against the Kansas City Southern Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Appellee, Mike Drew, brought this suit against the appellant railway companies to recover damages for injuries sustained by him while going over the tracks of the appellants at a public crossing in the town of Horatio, in Sevier county, Ark. The train crew of appellant had brought into the town of Horatio a long train of freight cars. The train was north bound, and was so heavy that the engine could not pull it up the grades north of Horatio. Immediately upon its arrival at Horatio, the train was stopped, and a part of it was left on the main track at the depot. The cars which were intended to be set out were pulled by the engine to the north end of the yards, and above the crossing at which appellee was injured. The accident occurred while these cars were being distributed on several tracks at the north end of the yard. The engine was switching the cars back and forth and placing them at the time the accident occurred. The railroad tracks at that point run north and south, and the public crossing

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extends across the track from east to west, leading in a northwesterly direction.

The appellee, Mike Drew, detailed the accident substantially as follows: "I had been to Horatio for a load of freight, and was returning along the public highway in a northwesterly direction. When I arrived in about 100 yards of the public crossing, I saw the engine which struck me switching back and forth in the yards. I continued on my journey until I arrived in about 20 feet of the track, when I stopped. The engine was about 100 feet north of the crossing, and was pointed north. I remained there three or four minutes, and then started to cross the track." We copy from his testimony the following question and answer: "Q. At the time you started across the track, what happened? A. Just before I started, the engineer looked as straight at me as I look at you; and when I started I suppose he started. I could not tell anything about that; but, anyway, he was on me before I knew it, and if he ever blowed a whistle or rung a bell I never knew nothing about it." Appellee has been deaf for about 40 years, and did not hear the engineer ring the bell or blow the whistle when the engine started back towards the crossing.

Again he says: "I got down to the crossing. The train backed about 100 feet, as near as I could get at it, and the engine stopped; and when the engineer stopped the engine I started, and when I got on the track it looked like he just came on as fast as he could, chug, chug, chug, and the first thing I knew I was covered up under the wagon bed." Appellee then detailed the extent and severity of his injuries.

Dorman Knight testified for appellee as follows: "I was present at the time appellee was struck. I was driving a hack, and was going from west to east; that is to say, I was going in an opposite direction to that in which appellee was going. When I got to the track, I saw that I could cross the track before the engine would reach it. The engine was then headed north. I did not hear them ring the bell or blow the whistle when they started to back the engine down towards the crossing. The hind wheels of my buggy were not at that time off of the track. The hind wheels were just coming upon the outside rails. In crossing the track, I went to the right and appellee to the left; I was driving faster than appellee. There was nothing to obstruct the view of appellee or those in charge of the engine, as far as the crossing was concerned. The engine was moving rapidly; and, so far as my knowledge goes, no effort was made to stop it after appellee got on the track. At the time the train started, I had not yet gotten on the track; but I thought that I could get across, and did do so. At the time the train started, appellee was still further away from the track."

For the appellant, the train crew testified that they were keep-

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ing a lookout; and neither the engineer nor the fireman saw the plaintiff on the track. The fireman and engineer both testified that the bell was ringing all of the time when the engine was in motion. The engineer said that when he started to back towards the crossing he was looking ahead towards the crossing, but did not see appellee. He testified that he was looking in that direction all of the time, except when he turned around to get signals from the fireman.

There was a trial before a jury, which resulted in a verdict for the plaintiff, and the case is here on appeal.

Read & McDonough, of Ft. Smith, for appellants.

Otis T. Wingo, of De Queen, for appellee.

HART. J. (after stating the facts as above). [1] It is first urged by appellant that the court erred in giving instruction No. 1, at the request of the appellee. The instruction is as follows: "You are instructed that if you find from a preponderance of the evidence that the plaintiff was struck and injured by an engine on defendant's road that this is prima facie evidence of negligence on the part of the defendant." The appellee was injured by the operation of defendant's train, and there was no error in giving the instruction. In the case of *St. L., I. M. & So. Ry. Co. v. Evans*, 80 Ark. 19, 96 S. W. 616, the court held: "Where it is established that the plaintiff was injured by the operation of a train, a prima facie presumption arises that the railroad was negligent." Other cases are cited in the opinion which sustain the holding of the court, and subsequent cases might be cited to the same point; but we deem the question so well settled that it is not necessary to do so.

[2, 3] 2. It is next contended by counsel for appellant that the court erred in giving instruction No. 2, as asked by the appellee. The instruction is as follows: "The jury are instructed that railway companies are charged with a high degree of care for the protection and safety of travelers upon highways at and in proximity to public crossings, and it is their positive duty to keep a constant lookout for such travelers, and to use every reasonable precaution, consistent with the proper operation and management of their trains, to avoid injuring them; and if you find from the evidence that the employees in charge of said engine failed to exercise such care, then you are instructed that such failure to keep such lookout was negligence; and if the plaintiff was injured by reason of such negligence, and without fault on his part, then your verdict should be for the plaintiff."

At the crossing of a railroad track and a highway, both the railway company and a traveler on the highway are bound to use ordinary care, the one to avoid inflicting injury, and the other to avoid being injured; and the degree of care to be exercised by each is that which a prudent man would exercise, under the circumstances of the case, in endeavoring to perform his duty.

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This rule is so well settled in this court that we need only cite a few of the cases bearing on the question: *St. L. & S. F. R. R. v. Carr*, 94 Ark. 246, 126 S. W. 850; *St. L., I. M. & So. Ry. Co. v. Johnson*, 74 Ark. 372, 86 S. W. 282; *St. L. & S. F. R. R. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64.

[4] Tested by this rule, the instruction was erroneous, in so far as it told the jury that railroad companies are charged with a high degree of care for the protection and safety of travelers on a highway at a public crossing. Instructions are given for the guidance of the jury; and under our Constitution "judges shall not charge juries with regard to matters of fact, but shall declare the law." It is true that a jury might find, under a given state of facts, that ordinary care, or the care that a prudent man would exercise under the circumstances, would be a high degree of care; but this would be an inference of fact to be drawn by the jury in estimating the evidence, and would result from the jury following a train of reasoning presenting itself from the facts and circumstances adduced in evidence. It is not within the province of the court to so declare as a matter of law. It is true an instruction in precisely the same language was unqualifiedly approved by this court in the case of *St. L., I. M. & So. Ry Co. v. Carroll*, 73 Ark. 413, 84 S. W. 475; but such action of the court was contrary to the rule above announced, which, as we have already seen, is well settled by the decisions, both prior and subsequent to the *Carroll* Case.

A careful examination and consideration of the whole instruction, however, leads us to the conclusion that the error was not prejudicial to the rights of appellant. Immediately after telling the jury that the railroad company was charged with a high degree of care for the protection of a traveler upon a highway at a public crossing, the court defined what it considered to be a high degree of care; that is to say, the court told the jury that it was appellant's duty to keep a constant lookout for travelers at crossings, and to use every reasonable precaution, consistent with the proper operation and management of their trains, to avoid injuring them. This the law requires them to do, and such acts on their part only amount to ordinary care. Continuing, the court told the jury, if it found from the evidence that the employees in charge of the engine failed to exercise such care, that it was instructed that such failure to keep such lookout was negligence, thereby in effect telling them that the failure to keep a constant lookout for travelers constituted negligence. So it may be said that, while the court told the jury that it was the duty of the railway company to exercise a high degree of care for the protection and safety of travelers at a public crossing, it went further and defined to the jury, in a concrete form, what acts were necessary to be performed by the servants of the appellant in the discharge of their duties towards such travelers;

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and the duties thus required to be performed by the servants of the railway company only amounted to the exercise of such care as a man of reasonable prudence and caution would exercise under the same circumstances. Thus we see that, when the whole instruction is considered, it does not appear that the action of the court amounted to an expression of opinion that, under the evidence, the railroad company should be held to a high degree of care; but the phrase "high degree of care," as specifically defined by the court, only amounted to ordinary care. In short, while the court used the words "high degree of care," yet, in explaining to the jury what constituted such care, the court mentioned only such acts as the railway company would be required to do and perform in the exercise of ordinary care. In this view of the matter, we do not think that appellant was prejudiced by the action of the court.

[5] 3. It is next insisted by the counsel for the appellant that the court erred in giving instruction No. 3, which is as follows: "You are instructed that it is the duty of a railway company to sound the whistle or ring the bell within at least 80 rods of a public crossing, and to keep the whistle sounding or the bell ringing until the crossing is passed or the train stopped, and that a failure to do so is negligence; so, in this case, if you believe from a preponderance of the evidence that the defendant was negligent in this regard, and that such negligence was the proximate cause of the injury, and that the plaintiff exercised ordinary care for his own safety, your verdict should be for the plaintiff."

They say that the accident occurred while the engine was switching back and forth in a space not to exceed 200 feet, and that the effect of the instruction was to tell the jury that the failure to keep the bell ringing at any point for a distance of 1320 feet was negligence.

[6] We do not think that the instruction is open to that objection. The instruction is based on section 6595 of Kirby's Digest, which provides that railroad companies are liable for all damages caused by their omission to ring a bell or sound a whistle, as required by the statute. The appellee had the right to assume that the engineer would not move the train over the crossing without giving the signals or warnings required by the statute. The instruction in effect told the jury that a failure to give the statutory signal on approaching the crossing constituted such negligence on the part of the railway company as to make it liable, provided the jury found such negligence was the proximate cause of the injury, and that appellee was not guilty of contributory negligence.

In the case of *Ark. & La. Ry. Co. v. Graves*, 96 Ark. 638, 132 S. W. 992, the court held that, where the negligence of the defendant's trainmen in failing to give the statutory signal of the approach of a train at an established crossing was the proximate

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cause of plaintiff's injury, the defendant will be liable, if the plaintiff was not guilty of contributory negligence. To the same effect, see *Ft. Smith & Western Ry. Co. v. Messek*, 96 Ark. 243, 131 S. W. 686, 966.

[7] 4. The jury returned a verdict in favor of the appellee for \$2,000, and it is claimed by counsel for appellant that the judgment should be reversed, because the verdict is excessive. The appellee testified that he was severely injured. He said that he came near dying, and spit up much blood for months after he received the injuries. He laid in bed 40 days without getting up. After he got up, he tried to pick cotton, but could not do it, because of the pain in his arms and legs. He says that he cannot raise his right arm at all now. He was 69 years of age at the time he received the injury, was a stout, able-bodied man, and was able to perform manual labor of all kinds. The testimony of the physicians who treated him tended to substantiate his evidence in regard to the character of his injuries. They treated him about two months after the accident, and charged him \$125 for their services. Each of them said that appellee's elbow got stiff and required considerable attention. Each physician said that they treated him altogether about 2½ or 3 months before they finally discharged him, and say that his injuries were not permanent. As above stated, appellee himself stated that his injuries are permanent, and that he cannot now perform the manual labor which he could perform before he was injured. While the allowance of damages made by the jury was very liberal, we cannot say, in the light of all of the testimony as the jury may have viewed it, that the damages are excessive.

[8, 9] 5. The negligence of the appellant and the contributory negligence of the appellee was properly submitted to the jury; and, under the facts of the case as detailed above, we think that the testimony was sufficient to warrant the verdict. In the case of *Majors v. St. L., I. M. & So. Ry. Co.*, 95 Ark. 94, 128 S. W. 571, the court held: "Where, in a suit against a railroad company for injury to a traveler at a crossing, the evidence tended to prove that the railroad company was negligent in failing to signal, and that the trainmen discovered plaintiff driving a team across the track when the train was 150 or 200 feet from the crossing, and that, as it was, plaintiff almost succeeded in crossing the track before the train struck and injured him, it was a question for the jury whether, if the signals had been given, plaintiff would have escaped injury; and therefore it was error to direct a verdict for the defendant."

The judgment will be affirmed.

COCKE *v.* DES MOINES CITY RY. CO.

(Supreme Court of Iowa, May 16, 1912.)

[136 N. W. Rep. 221.]

Carriers—Collision with Train—Stop, Look, and Listen Rule—Instruction.*—In an action by a street car passenger injured in a collision of the car with a railroad train, where it appeared that the motorman had endeavored to look out for trains, an instruction that it was the duty of the motorman to stop and look at a point where he might reasonably expect to see the approaching train was erroneous, in imposing too high a degree of care, since one about to cross a railroad track is not as matter of law negligent for failure to stop, look, and listen, though he is bound to use his senses, so that whether the motorman used due care in looking for trains was for the jury.

Carriers—Passengers—Negligence of Motorman.†—It cannot be said as a matter of law that a motorman on approaching a railroad crossing is justified in crossing at the signal of the watchman without himself exercising any caution to see whether a train is approaching.

Appeal from District Court, Polk County; W. H. McHenry, Judge.

Action to recover damages for personal injury. Judgment for plaintiff, and defendant appeals. Reversed.

Guernsey, Parker & Miller, of Des Moines, for appellant.

Clark & Hutchinson and *Thos. A. Cheshire*, all of Des Moines, for appellee.

*For the authorities in this series on the subject of the care required of a highway traveler to discover an approaching train before attempting to cross steam railroad tracks, see first foot-note of *Beech v. Missouri, etc., Ry. Co.* (Kan.), 41 R. R. R. 652, 64 Am. & Eng. R. Cas., N. S., 652; second foot-note of *Philadelphia, etc., R. Co. v. Buchanan* (Del.), 40 R. R. R. 23, 63 Am. & Eng. R. Cas., N. S., 23; *Mississippi Cent. R. Co. v. Hanna* (Miss.), 40 R. R. R. 14, 63 Am. & Eng. R. Cas., N. S., 14; *Bates v. San Pedro, etc., R. Co.* (Utah), 40 R. R. R. 413, 63 Am. & Eng. R. Cas., N. S., 413; first foot-note of *Heinz v. Baltimore & O. R. Co.* (Md.), 38 R. R. R. 172, 61 Am. & Eng. R. Cas., N. S., 172; first head-note of *Brommer v. Pennsylvania R. Co.* (C. C. A.), 38 R. R. R. 51, 61 Am. & Eng. R. Cas., N. S., 51.

†For the authorities in this series on the subject of the right of a highway traveler to rely on the invitation or direction of a railroad employee to cross railroad tracks, see last paragraph of foot-note of *Union Pac. R. Co. v. Rosewater* (C. C. A.), 29 R. R. R. 193, 52 Am. & Eng. R. Cas., N. S., 193, where all those preceding it are collected or referred to.

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WEAVER, J. The Chicago, Rock Island & Pacific Railway Company owns and operates a double-track line of railroad between its station in the city of Des Moines and the State Fair Grounds on the east border of the city. The defendant, Des Moines City Railway Company, owns and operates an electric street railway which crosses the Rock Island tracks and the tracks of other railroads a short distance east of the station aforesaid. Prior to the accident hereinafter mentioned, it had been the custom of the City Company to protect its cars and passengers in making such crossing by the use of a derailer switch, and by requiring the motorman to stop his car before entering the zone of danger and the conductor to walk over the crossing, and, if no train was approaching, to close the switch, and signal the motorman forward. At the date of the accident the State Fair was in progress, and the passenger traffic upon both lines was heavy. During that period defendant spiked its derailer so that it could not be opened, and placed at the intersection a watchman whose duty it was to give the necessary signals to approaching cars to prevent accidents or collisions. The Rock Island Company also employed a watchman for the performance of similar duties at the same crossing. On September 2, 1909, the plaintiff, with others, were passengers on defendant's car No. 165, which was moving south over the crossing above described. The motorman stopped the car at the place where he had been accustomed so to do near the derailer switch about 40 feet north of the Rock Island track, and where he could see, if he looked, about 190 feet westward along the last-named track. He testifies that he saw two flagmen on the crossing in front of him, the one nearest his car using a white flag and the one farther south a red flag, though he did not know by which company they were employed. According to his statement, the watchman with the white flag motioned him to come forward, and, as he was in the act of attempting the crossing, a train was discovered approaching from the west on the south track of the Rock Island Road, and the other watchman signaled the motorman to stop, but too late to avoid the collision which followed. In that collision plaintiff, with others of the passengers, received injuries of greater or less severity.

This is the same collision, and, with one exception, to which we shall later make reference, involves the same state of facts, so far as the question of negligence is concerned, which we had to consider in *Parker v. Railway Company*, 133 N. W. 373. The negligence charged consists of the alleged failure of the defendant's motorman to discover the approach of the Rock Island train and guard against the threatened collision, in failing to stop the car before entering upon the Rock Island tracks, and in entering upon said tracks with knowledge or means of knowledge of the approach of a train having preference in right of way at the crossing. The defendant denies all charges of negligence on its part.

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Upon the trial and in the argument, it is not seriously contended that there was no negligence in the matter of this collision, but it was and is the position of the defendant that the negligence to which the collision should be attributed was that of the Rock Island Company alone, for whose omissions and mistakes defendant is not liable.

[1] 1. The evidence is undisputed that the motorman stopped his car at a point near the derailer and about 40 feet north of the Rock Island tracks, and looked for approaching trains. Buildings in that vicinity obstructed his view to the west beyond a point about 190 feet from the crossing. He could have stopped or looked again at a point nearer the track, giving a more extended view to the west, and the jury could properly have found that, had he done so, he would have discovered the approaching train in time to have prevented the collision. But, relying upon the signal of the watchman who motioned him forward as an assurance that the way was clear, he proceeded from his position at the derailer, and undertook to make the crossing without again stopping or looking to the west. Neither flagman testified as a witness upon the trial below. As bearing upon this state of facts, the trial court both in the Parker Case and in the case at bar instructed the jury as follows: "In determining whether or not this defendant was guilty of negligence, you will take into consideration the fact that the law requires of them the highest degree of care and prudence reasonably consistent with the practical operation of its railway. You will consider whether the motorman of the defendant's car, in charge thereof, used all his faculties of sight and hearing to ascertain the approach of danger; whether he stopped his car and looked and listened for the approach of the train on the Chicago, Rock Island & Pacific Railway; whether he used the degree of care above stated in all the things he did with reference to the management and operation of the said car. *And you are instructed that it was the duty of the said motorman to stop and look at the point where he might reasonably expect to see the approach of a train on the Chicago, Rock Island & Pacific Railway tracks.* The duty of the defendant, however, does not require it to act as an insurer of the lives and safety of its passengers. And when they have exercised the degree of care and prudence required, as hereinbefore explained to you, they are not responsible for accidents which occur from reasons beyond their control, and notwithstanding the existence of this prudence and foresight required." In our opinion in the Parker Case the proposition of this instruction which makes it the duty of the motorman as a matter of law to stop his car before entering upon the track was disapproved, and because of such error a new trial was ordered. The reasons for this holding are there stated quite fully, and we need not here repeat them. That precedent controls upon the same point in this case, and we are not disposed to depart

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from it. It follows that the assignment of error upon the giving of the sixth paragraph of the court's charge must be sustained.

2. In the Parker Case the plaintiff introduced in evidence the rules of the defendant company governing the duty of its motormen and conductors in the handling of cars at railway crossings, and his testimony was awarded weight in the discussion of the record upon appeal. In the case at bar the rules were not offered in evidence, and it is with respect to this feature of the trial that this record differs in any material respect from that in *Parker v. Railway Co.* This distinction is pointed out in argument as being sufficient to require a different conclusion upon the question of defendant's negligence. We cannot so hold. It is to be admitted that in the former case the rules were treated as an item of evidence worthy of consideration, but they constituted but one of many pertinent facts and circumstances affecting the merits of the claim and defense. Their absence in this case may to that extent lessen the strength or persuasiveness of the plaintiff's showing, but it by no means leaves the case so devoid of support as to require its withdrawal from the jury. For a more specific statement of the facts developed, aside from the company's rules, we refer to the opinion in *Parker v. Railway Company*, where they are stated with considerable particularity. It is enough here to say that they are amply sufficient to take the issue to the jury.

[2] 3. It is argued by counsel that the opinion in the Parker Case misstates or misapplies the law, and a reconsideration of the holding there made upon the sufficiency of the evidence is asked. The point urged, when reduced to its briefest expression, is that the motorman, having been signaled forward by one of the flagmen, could rightfully rely thereon, and this court should say as a matter of law that a charge of negligence cannot be predicated upon the fact that, relying upon such signal, the motorman took his car filled with passengers into collision with an on-coming train which he could easily have avoided had he taken the precaution to glance to the right after passing the derailer 40 feet north of the place of the accident. If this be the law, we confess to having misapprehended its true import. It may be true, it doubtless is true, that the presence of the flagman and his signal are material facts bearing upon the ultimate question whether the motorman, and, through him, the defendant, exercised that high degree of care which the law imposed upon them for the protection of their passengers, but we must respectfully insist that there is no sound rule or principle of law and no decided case of recognized authority to sanction the holding that a motorman about to make a dangerous crossing with a load of passengers and receiving such signal may abandon all exercise of caution on his own part, and as a matter of law be held guiltless of negligence, although the peril into which he plunges his living freight could have been escaped had he looked and acted while still within the

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zone of safety. We have just upheld the defendant's contention that an instruction making it negligence as a matter of law for the motorman to enter upon the crossing without first stopping his car was erroneous, but we cannot follow counsel to the opposite extreme, and hold that as a matter of law the full measure of care required of the defendant and its motorman is satisfied when the latter undertakes to shift the whole responsibility for the safety of the crossing upon another person or another servant, and ceases to exercise any vigilance whatever on his own part against the possibility of a collision. Whether due care has been exercised under such circumstances is a question of fact and not of law, and it is for the jury, and not for the court, to determine it.

For the error in the instruction to which reference has been made, the judgment below will be reversed and a new trial ordered.

Reversed.

KNEESHAW *v.* DETROIT UNITED RY.

(Supreme Court of Michigan, May 3, 1912.)

[135 N. W. Rep. 903.]

Negligence — Contributory Negligence — Imputed Negligence.* — One injured by a collision between a street car and an automobile, while riding in the automobile with its owner who was driving, was chargeable with the contributory negligence of the owner.

Street Railroads—Collision—Contributory Negligence.—While an automobile was circling across a street railway track, its occupants discovered that its steering gear was out of order, and no effort was made to use the ordinary means at hand to stop the automobile, although a street car was known to be near; but it was permitted to run in a second circle which brought it into collision with the street car. Held, that there was contributory negligence barring recovery.

Street Railroads — Collision — Contributory Negligence — Sudden Peril.†—Under such circumstances, where the injured party had

*For the authorities in this series on the subject of imputed negligence, see extensive note, 10 R. R. R. 114, 33 Am. & Eng. R. Cas., N. S., 114; foot-note of *Field v. Spokane, etc., Ry. Co.* (Wash.), 42 R. R. R. 686, 65 Am. & Eng. R. Cas., N. S., 686; second head-note of *Flynn v. Chicago City Ry. Co.* (Ill.), 41 R. R. R. 627, 64 Am. & Eng. R. Cas., N. S., 627; last foot-note of *Louisville & N. R. Co. v. Calvert* (Ala.), 40 R. R. R. 8, 63 Am. & Eng. R. Cas., N. S., 8.

†See extensive note, 34 R. R. R. 733, 57 Am. & Eng. R. Cas., N. S., 733; foot-note of *Dickinson v. Erie R. Co.* (N. J.), 42 R. R. R. 734, 65 Am. & Eng. R. Cas., N. S., 734; first foot-note of *Louisville & N. R. Co. v. Wilson* (C. C. A.), 42 R. R. R. 613, 65 Am. & Eng. R. Cas., N. S., 613; last head-note of *Chesapeake & O. Ry. Co. v.*

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ample time to think and act after discovering that the steering gear was out of order, the rule relieving one placed in a position of sudden peril from the charge of negligence for taking the wrong course had no application.

Street Railroads—Negligence—Last Clear Chance.—Where an automobile after crossing a street car track suddenly circled from a place of safety and again approached the track and collided with a street car before the motorman had reason to suspect the danger, the motorman was not negligent for failure to avert the collision.

Error to Circuit Court, Wayne County; James O. Murfin, Judge.

Action by James W. Kneeshaw against the Detroit United Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before MOORE, C. J., and McALVAY, STONE, OSTRANDER, and BIRD, JJ.

N. Calvin Bigelow, of Detroit (*Henry C. L. Forler*, of Detroit, of counsel), for appellant.

Brennan, Donnelly & Van De Mark, of Detroit, for appellee.

BIRD, J. This is a personal injury case in which the trial court, at the conclusion of the proofs, directed a verdict for the defendant. The plaintiff has assigned error: The plaintiff and one Hodgson were riding with Mr. Edward Frolich in his electric automobile in the city of Detroit, going east on Jefferson avenue, intending to turn down Brush street. When they reached Brush street, they were prevented from doing so by reason of a wagon which was in the way, so they continued their course on Jefferson avenue 90 to 100 feet beyond the intersection. At this point they started to circle around to the left, intending to go straight into Brush street. After they crossed the defendant's tracks and were nearing the north curb, Mr. Frolich discovered that the steering gear had caught in some way and would not respond to the lever. The machine kept on in a circle, reaching the south curb just east of Brush street, when it immediately started northward on the second circle. When it reached defendant's south track, it collided with one of its east-bound cars, wrecking the automobile and injuring plaintiff. The view which the trial court took of the proofs was that they failed to establish the negligence of the defendant, but did establish the contributory negligence of Mr. Frolich.

[1] There is much discussion in the briefs of counsel as to the

Hawkins (C. C. A.), 42 R. R. R. 486, 65 Am. & Eng. R. Cas., N. S., 486; foot-note of *Shaffer v. Beaver Valley Traction Co.* (Pa.), 41 R. R. R. 426, 64 Am. & Eng. R. Cas., N. S., 426; first foot-note of *Montgomery v. Colorado Springs & L. Ry. Co.* (Colo.), 40 R. R. R. 697, 63 Am. & Eng. R. Cas., N. S., 697.

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occurrences which preceded and led up to the collision, and counsel are in direct conflict as to many of the incidents. We think it would profit little to discuss the question of the negligence of the defendant, for the reason that, whatever our conclusion might be as to that question, the case will have to be affirmed on the ground of the contributory negligence of Mr. Frolich, whose negligence, so far as this case is concerned, is the negligence of the plaintiff.

[2] It was clearly the duty of Mr. Frolich to stop his car when he learned that he could not guide it. He learned this fact just after he crossed the tracks the first time while on his way north around the circle. Instead of stopping his car, as an ordinarily prudent person would do, he kept on around the circle and passed in front of the street car and completed the circle at the south curb, and immediately started on another circle knowing the street car was very near. The automobile was not traveling at any time to exceed two miles an hour, and had he shut off his power or applied his brake at any point before starting on the second circle, the machine would have stopped almost instantly. The failure to use the usual and ordinary instrumentalities provided for stopping the car is, under the circumstances of this case, such contributory negligence as will bar a recovery.

[3] In attempting to excuse plaintiff's failure to stop the automobile, his counsel argues that plaintiff was suddenly placed in a position of peril, and he seeks to apply the rule that is often applied in such cases. The difficulty with this contention is the plaintiff was not suddenly placed in a position of peril. He knew when he crossed the tracks going north on the first circle that he could not control his automobile, and he had ample opportunity to think and act while he was going on around the circle and before he reached the south curb. If Mr. Frolich had not discovered that his steering gear was out of order until after he had crossed in front of the car, there might be some room for such a claim. The facts as Mr. Frolich himself details them leave no room for the application of that rule.

[4] It is also urged that, even though plaintiff were negligent, the motorman should have discovered the peril plaintiff was in and averted the collision. After the automobile crossed the track in front of the car going toward the south curb, it was apparently in a place of safety, and it was not until it circled around and commenced to approach the track again that the motorman had any reason to suspect that plaintiff was in any danger. After that, and before the impact, the time was very brief, and there is no proof that the motorman did not do what he could to avoid the collision.

The judgment of the trial court is affirmed.

SANDERS v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina, Jan. 17, 1912.)

[73 S. E. Rep. 356.]

Appeal and Error—Review—Judgment of Nonsuit—Extent. — A nonsuit will not be sustained by the Supreme Court on grounds not presented to the circuit court, but where the circuit court grants a nonsuit on specified grounds after the denial of a nonsuit on other grounds, defendant may request the Supreme Court to sustain the nonsuit on the latter grounds.

Trial—Questions for Jury—Nonsuit—When Authorized.—Where there is some testimony supporting plaintiff's case, a nonsuit is improper.

Railroads—Operation—Injuries to Licensee on Track—Care Required.*—Where for many years the public generally passed along a railway company's right of way in a switchyard without objection from the company, and without the posting of any notice for—

*For the authorities in this series on the question what does, and does not, constitute a licensee to travel on or cross railroad tracks, see foot-note of *Baltimore, etc., R. Co. v. Welch* (Md.), 41 R. R. R. 617, 64 Am. & Eng. R. Cas., N. S., 617; foot-note of *Hillman v. Boston Elev. Ry. Co.* (Mass.), 40 R. R. R. 58, 63 Am. & Eng. R. Cas., N. S., 58; first foot-note of *Norfolk, etc., R. Co. v. Overton* (Va.), 39 R. R. R. 271, 62 Am. & Eng. R. Cas., N. S., 271; second head-note of *Arkansas, etc., R. Co. v. Graves* (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259.

For the authorities in this series on the subject of the duties of trainmen to licensees or trespassers on railroad tracks before their presence is discovered, see first paragraph of foot-note of *St. Louis, etc., R. Co. v. Williams* (Ark.), 41 R. R. R. 786, 64 Am. & Eng. R. Cas., N. S., 786; fifth head-note of *Myers v. Chicago, etc., R. Co.* (Iowa), 41 R. R. R. 770, 64 Am. & Eng. R. Cas., N. S., 770; second foot-note of *Chesapeake, etc., Ry. Co. v. Banks* (Ky.), 41 R. R. R. 667, 64 Am. & Eng. R. Cas., N. S., 667; eighth head-note of *Baltimore, etc., R. Co. v. Welch* (Md.), 41 R. R. R. 617, 64 Am. & Eng. R. Cas., N. S., 617; foot-note of *Dempsey v. Norfolk, etc., R. Co.* (W. Va.), 41 R. R. R. 260, 64 Am. & Eng. R. Cas., N. S., 260; foot-note of *Southern Ry. Co. v. Wiley* (Va.), 40 R. R. R. 473, 63 Am. & Eng. R. Cas., N. S., 473; first foot-note of *Louisville & N. R. Co. v. Bays* (Ky.), 40 R. R. R. 86, 63 Am. & Eng. R. Cas., N. S., 86; *Central of Georgia R. Co. v. Blackmon* (Ala.), 39 R. R. R. 292, 62 Am. & Eng. R. Cas., N. S., 292; foot-note of *Shields v. Southern Pac. Co.* (Ore.), 39 R. R. R. 166, 62 Am. & Eng. R. Cas., N. S., 166; last foot-note of *Birmingham Southern R. Co. v. Fox* (Ala.), 37 R. R. R. 407, 60 Am. & Eng. R. Cas., N. S., 407.

For the authorities in this series on the subject of the care due from trainmen to licensees and trespassers on railroad tracks after their presence is discovered, see foot-note of *Covington, etc., Bridge Co. v. Marsh* (Ky.), 38 R. R. R. 196, 61 Am. & Eng. R. Cas., N. S., 196; foot-note of *Demand v. New York, etc., R. Co.* (N. Y.), 37 R. R. R. 56, 60 Am. & Eng. R. Cas., N. S., 56.

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bidding such use, a finding that the use was acquiesced in by the company was authorized, and a person on the past so used was a licensee and entitled to ordinary care on the part of the company to prevent injury to him, and, in view of the frequency of the use of the right of way by the general public, the company must anticipate the presence of persons on its track at that place, and must exercise due care to prevent injury to them.

Trial—Questions for Jury—Inferences from Evidence. — Where more than one inference can be reasonably drawn from the testimony, the jury must be permitted to draw the inference, but where the testimony is susceptible of only one inference, the court will declare what that inference is.

Railroads—Operation—Injuries to Person on Track—Complaint—Negligence.—A complaint in an action against a railroad company for injuries to a person struck by a train, which alleges that the train ran at a high rate of speed and without giving any signal, so that plaintiff might have been made aware of the approach of the train, does not limit the charge of negligence to the rate of speed of the train.

Railroads—Operation—Injuries to Person on Track—Negligence—Question for Jury.—In an action for injuries to a person struck by a train, evidence held to require submission to the jury of the question whether the train was operated at a dangerous speed.

Railroads—Operation—Injuries to Person on Right of Way—Contributory Negligence.—One walking on a well-defined path on a railroad right of way in common use by the public generally was not guilty of negligence, as a matter of law, because he walked too close to a track, when there was room enough to walk at a safe distance

Appeal from Common Pleas Circuit Court of Charleston County; Robt. Aldrich, Judge.

“To be officially reported.”

Action by Robert B. Sanders against the Southern Railway, Carolina Division. From a judgment of nonsuit, plaintiff appeals. Reversed.

Logan & Grace, for appellant.

Jos. W. Barnwell, for respondent.

HYDRICK, J. This is an appeal from an order of nonsuit in an action to recover damages for personal injuries sustained by plaintiff, as the result of the alleged negligent, reckless, and wanton conduct of defendant in operating a train of cars, which struck plaintiff, knocked him down and ran over his leg, crushing it so that it had to be cut off. At the close of plaintiff's testimony, the defendant moved for a nonsuit upon two grounds: (1) Because there was no evidence of recklessness or wantonness; (2) because, as to the cause of action for negligence, un-

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der the evidence, plaintiff was a trespasser in defendant's switchyard, and defendant owed him no duty, except not to recklessly or wantonly injure him. The presiding judge sustained the first ground, but overruled the second, holding that the evidence made an issue whether plaintiff was not a licensee and entitled to ordinary care to prevent injury to him. But he granted the nonsuit on two grounds: (1) That there was no evidence of negligence, saying that the negligence complained of was in operating the train at a high rate of speed, and that the only evidence of the speed of the train was that of the plaintiff, who said that he neither saw nor heard the train, and, therefore, he could not testify as to its speed; (2) that plaintiff's injury was caused by his own negligence in walking on or near the track when there was room enough for him to walk at a safe distance from it. These rulings are made the grounds of exceptions; and the defendant, according to proper practice, gave notice that this court would be asked to sustain the nonsuit upon the second ground upon which it was moved for on circuit.

[1] Appellant's contention that respondent is not entitled to have the second ground upon which the motion for nonsuit was based on circuit considered by the court, as a sustaining ground is untenable. The cases cited in support of his position hold merely that a nonsuit will not be sustained by this court on additional grounds which were not presented to the circuit court. In *Lewis v. Hinson*, 64 S. C. 578, 43 S. E. 15, the court did consider an additional ground to sustain a nonsuit; but in that case, as in this, the ground considered was one which had been presented to the circuit court. In *Kennedy v. Greenville*, 78 S. C. 127, 58 S. E. 990, the court does say: "It is well settled that a nonsuit cannot be sustained on grounds additional to those on which it was granted." Standing alone, this statement of the rule is inaccurate, and is susceptible of a meaning which was not intended by the court, as appears from a consideration of the opinion as a whole, for on the next page, the court stated the rule, correctly thus: "Hence we hold that the motion for a nonsuit must stand or fall upon the grounds set forth in the motion."

[2] As the case will have to go back for a new trial, we will not discuss the testimony more than is necessary to sustain our conclusion; and, in what we shall say, we must not be understood as expressing any opinion as to the sufficiency of the evidence to prove the facts in issue, or as to whether the inferences which we suggest might have been drawn from the testimony should be drawn. What inferences should be drawn are exclusively for the jury. But we merely hold that there was some testimony tending to support plaintiff's case, and, therefore, that the nonsuit was improper.

[3] Plaintiff's testimony tended to show that he was struck

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while walking alongside of defendant's track in a well-beaten path at a place where the general public had been accustomed to walk for many years, without any objection from defendant; that the train which struck him was running backwards, at the rate of from 12 to 20 miles an hour, through a populous section of the city of Charleston at a place where men, women, and children were constantly passing and repassing along defendant's right of way and upon and near its tracks; that the train ran upon him from behind, without any signal or warning of its approach being given. We think this testimony made out a prima facie case for plaintiff. From it the jury might reasonably have inferred that the use of its right of way by the public was known to and acquiesced in by defendant, and, therefore, that plaintiff was a licensee and entitled to ordinary care on the part of defendant to prevent injury to him; and, also, from the frequency of the use by the general public, that defendant should have anticipated the presence of persons on or near its tracks at that place, and should have exercised due care to prevent injury to them. *Jones v. Railway*, 61 S. C. 556, 39 S. E. 758; *Matthews v. Railway*, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286; *McKeown v. Railroad Co.*, 68 S. C. 483, 47 S. E. 713; *Goodwin v. Railroad Co.*, 82 S. C. 321, 64 S. E. 242; *Bamberg v. Railroad Co.*, 72 S. C. 389, 51 S. E. 988; *Lamb v. Railroad Co.*, 886 S. C. 106, 7 S. E. 958, 138 Am. St. Rep. 1030.

In the *Jones Case*, the court said: "Even though the use of the track by the public as a walkway was not for such length of time nor of such character as to give a legal right to so use the track, and even though the evidence fell short of showing any positive consent to such use by the company, yet if there was evidence tending to show knowledge of any acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons upon the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the company, under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care under the circumstances to avoid injury." In the *Matthews Case*, the court said: "But where a railroad company allows the public to use its right of way for a long time at a particular place in a large town so continuously and frequently that it becomes a well-beaten or clearly defined path, plain and open, a reasonable man may well infer that he will not encounter unguarded cuts and the other dangers of the ordinary path along the railroad track. In such a case, the owner of the property knows and acquiesces in the use, and by his acquiescence those wishing to go in that direction are lured into a sense of safety in following the course obviously taken by those who have preceded them. If the owners,

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or those in control of the property, fail to observe ordinary care in avoiding injury to persons who travel the path, relying on the safety suggested by the implied invitation, they must be held responsible." This doctrine was reaffirmed in each of the other cases above cited and it is the settled law of this state.

But in its second ground of the motion for nonsuit and in its argument in this court, defendant seeks to bring this case within the principle upon which the cases of *Hale v. Railroad Co.*, 34 S. C. 292, 13 S. E. 537, and *Haltiwanger v. Railroad Co.*, 64 S. C. 7, 41 S. E. 810, were decided. The facts upon which those cases were decided were somewhat alike, but not so nearly so that the *Hale* Case cannot be distinguished from the *Haltiwanger* Case, and also from the cases above cited and from this case, but the *Haltiwanger* Case cannot be reconciled with the cases above cited, and therefore it and the *Hale* Case, in so far as they are at variance with those cases, are no longer to be considered as authority.

The defendant contends that this case should be distinguished from the *Jones* Case and those following it, on the ground that, in this case, the accident occurred in defendant's switchyard, where there were numerous tracks upon which cars and trains were being constantly switched, and therefore the danger to pedestrians was so great and obvious that it cannot be reasonably inferred that defendant acquiesced in the use of its switchyard by them. There is some force in this contention, and it is supported by high authority. The same rule that was announced in the *Jones* Case prevails in the state of Georgia, yet the courts of that state hold that it is not applicable to cases where the injury occurs in the railroad company's switchyard. This exception to the rule is based by the Georgia courts upon the ground that the continuous use of the tracks in a switchyard for switching purposes and the obvious and peculiar dangers to pedestrians there are inconsistent with an inference that the company has impliedly invited or licensed persons to use the yard as a walkway. *Waldrop v. Georgia R. & Banking Co.*, 7 Ga. App. 342, 66 S. E. 1030.

We think, however, that ordinarily the question whether the company knew of and acquiesced in such use of its right of way, whether it be in the switchyard or elsewhere on the right of way, is one of fact to be determined by the jury. In the *Matthews* Case the court said: "It is, of course, always a question for the jury to determine whether the way was so plain and so constantly used, with the acquiescence and consent of the owner, as to imply an invitation to the public to enter."

[4] Of course, the testimony tending to support the allegation of knowledge and acquiescence on the part of the company may be susceptible of only one inference, and, in that event, the court should declare what that inference is. But, as in other cases, where more than one inference can be reasonably drawn from the testimony, the jury must be allowed to say what inference

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should be drawn. We held, in the Lamb Case, that the obvious danger of attempting to walk across a river on a high railroad bridge, a quarter of a mile long, over which trains were frequently passing when the company had posted a notice forbidding such use of the bridge, was fatal to any reasonable inference of acquiescence on the part of the company in such use of its bridge. In that case, the court said: "When a railroad company or other owner of dangerous property warns persons against its use, those who insist on incurring the peril of using it, however numerous they may be, have no right to charge the owner with acquiescence in the use." But in this case, there was testimony that, for more than 35 years, the defendant's right of way at the place where plaintiff was hurt had been used by plaintiff and the public generally as a footway, without let or hindrance, and that no sign or notice had ever been posted forbidding such use. We think, therefore, that there was no error in overruling the second ground of the motion for nonsuit.

[5] His honor erred in holding that the rate of speed was the negligence complained of. The complainant charges negligence in that "said train of cars approached said traveled place or walkway and populous part of the city of Charleston at a high and dangerous rate of speed, and without giving any signal by ringing the bell so that the said plaintiff might have been made aware of the approach of said train of cars, or taking any precautions whatever to avoid injuring said plaintiff, so that said plaintiff was unaware of the approach of said train of cars."

[6] Considering plaintiff's testimony as a whole, we think the issue as to the speed of the train should have gone to the jury. At a previous trial, when he was asked at what speed the train was moving, plaintiff answered: "Judging from the way it hit me, I should judge it was not less than 12 to 15 miles an hour." This was brought out on his cross-examination at this trial, because, in his direct examination at this trial, he testified that the speed of the train was "at least about 12 to 15 or 20 miles." At this trial, however, he gave no reason for his estimate of the speed, except as it may be involved in his answer at the former trial. But he testified that he did not lose consciousness when he was run over by the train, and he did not say that he did not see or hear the train after it struck him. His estimate of its speed may have been based upon what he saw and heard of it at the time it struck him and was passing over him and after it had passed over him. Sometimes we reach correct conclusions without being able to give satisfactory reasons for them. Inasmuch as plaintiff testified positively as to the speed of the train, and although he assigned a reason at the former trial for his estimate of the speed which may have been faulty, we are not prepared to say that his testimony on this point is entitled to no weight

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at all. It should have been submitted to the jury for what it was worth.

[7] We think his honor erred also in holding that plaintiff was guilty of negligence in walking too close to the track when there was room enough for him to walk at a safe distance from it. The testimony was that he was walking in a well-defined path. From this, the jury might have inferred that the path had been used by many people before, and that in walking where many others had gone before, plaintiff was exercising ordinary care. In *Lamb's Case*, the court said: "In the cases cited (that is, the *Jones Case* and those following it), it was entirely consistent with reason to say that it was not negligence per se for a person to walk on the right of way expecting to step off on the approach of a train." See, also, *Matthews v. Railway*, *supra*, and *Sentell v. Railway*, 70 S. C. 183, 49 S. E. 215.

Reversed.

GARY, C. J., and WOODS, J., concur.

 RICE v. SOUTHERN RY. CO.

(Supreme Court of Alabama, Nov. 21, 1911.)

[56 So. Rep. 587.]

Negligence—Trespassers—Duty Owed.*—The only duty a railway company owes a trespasser is not to willfully or wantonly run over him or not to negligently do so after discovering his peril.

Discovery—Answers—Interrogatories.—An answer to an interrogatory should not be stricken out merely because irresponsible, where it is not shown that it was not pertinent.

Appeal and Error—Record—Questions Presented.—Where the record on appeal did not contain the count of the complaint upon which trial was had, rulings upon evidence and instructions cannot be reviewed.

Appeal from Circuit Court, Lawrence County; D. W. Speake, Judge.

Action by W. F. Rice, as administrator, against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Chenault & Chenault and *Chenault & Downing*, for appellant.

ANDERSON, J. The judgment entry and brief of appellant's counsel indicate that the complaint consisted of 4 counts, two orig-

*See foot-note of preceding case.

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inal ones and 3 and 4 added by way of amendment. It also appears that demurrers were sustained to counts 1 and 3 and overruled as to 2 and 4. It also appears that count 2 was withdrawn by the plaintiff, and the case was tried on count 4 alone. We have searched the record in vain for counts 3 and 4, and find no counts at all in the proper place in the record, but have succeeded in finding two unnumbered counts sandwiched in on lettered pages between pages 136 and 137 in the bill of exception part of the record. These two counts are unnumbered; but, owing to the date of filing and the fact that they appear between the summons and the return, we can only treat them as original counts 1 and 2. Count 2 was voluntarily withdrawn by the plaintiff, and there was no error in sustaining the defendant's demurrer to count 1. "While a complaint need not define the *quo modo*, or specify the particular acts of diligence omitted, yet, when simple negligence constitutes the cause of action, it is incumbent upon the plaintiff to bring himself within the protection of the negligence averred by alleging such a relationship as would enable him to recover for simple negligence." *L. & N. R. R. Co. v. Holland*, 164 Ala. 73, 51 South. 365, 137 Am. St. Rep. 25; *Gadsden R. R. Co. v. Julian*, 133 Ala. 373, 32 South. 135; *Ensley Ry. Co. v. Chewning*, 93 Ala. 25, 9 South. 458.

[1] For ought that appears from count 1, the intestate was a trespasser, and the only duty that the defendant owed him was not to willfully or wantonly run over him or not to negligently do so after discovering his peril, and which said averment is utterly wanting in said count 1. The case of *Highland Ave. R. R. Co. v. Robbins*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153, cited by counsel, is not only not in conflict with this holding, but supports us in deciding that count 1 makes the intestate a trespasser.

[2] The trial court did not commit reversible error for refusing to strike so much of the answer of the defendant as was not responsive to the twelfth interrogatory. So far as we can judge, as the only count upon which the case was tried is not before us, the answer was pertinent, and whether responsive or not it should not have been stricken. *Sullivan Timber Co. v. L. & N. R. R. Co.*, 163 Ala. 134, 50 South. 941, wherein the cases of *First Nat. Bank v. Leland*, 122 Ala. 289, 25 South. 195, and *Garrison v. Glass*, 139 Ala. 512, 36 South. 725, were expressly overruled.

[3] Since the record does not disclose count 4, the only one under which this case was tried, we cannot review the action of the trial court in ruling upon the evidence or in giving or refusing charges.

The judgment of the circuit court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

LOUISVILLE, H. & ST. L. RY. CO. *v.* LYONS.

(Court of Appeals of Kentucky, Feb. 6, 1912.)

[143 S. W. Rep. 31.]

Railroads—Injuries to Licensees—Duty of Company.*—While a railroad company only owes to a trespasser the duty of exercising ordinary care to prevent injuring him after discovering his peril, it must maintain a lookout, give warning, and run at reasonable speed to protect a licensee on the track.

Railroads—Injuries to Licensees—License to Use of Crossing.*—Immediately in front of defendant railroad company's station was a ditch on the right of way, across which a plank bridge was constructed by others than the company for the accommodation of inhabitants of the town desiring to cross over the track, and the bridge was used as an approach for crossing the track for many years with the company's knowledge. Held, that persons using the bridge and track of the crossing were licensees, for whom the company was compelled to keep a lookout and give warning in operating its train.

Railroads—Crossing Injuries—Duties of Company.†—A railroad company must keep a lookout and also give warning and run at a reasonable speed in approaching a public crossing or a crossing it has licensed as such, and failure to perform either of such concurrent duties is actionable negligence if injury results.

Railroads—Crossing Injuries—Contributory Negligence.‡—That a railroad company was negligent in striking decedent at a crossing would not make it liable if plaintiff was guilty of contributory negligence.

*See foot-note of preceding case.

†For the authorities in this series on the subject of the duty to maintain a lookout upon a train approaching a crossing, see second foot-note of *Chesapeake, etc., R. Co. v. Banks* (Ky.), 41 R. R. R. 667, 64 Am. & Eng. R. Cas., N. S., 667; first foot-note of *Louisville & N. R. Co. v. Calvert* (Ala.), 40 R. R. R. 8, 63 Am. & Eng. R. Cas., N. S., 8; fourth head-note of *Arkansas, etc., R. Co. v. Graves* (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259.

See first foot-note of *White v. New York, etc., R. Co.* (Mass.), 31 R. R. R. 488, 54 Am. & Eng. R. Cas., N. S., 488.

For the authorities in this series on the question whether the speed of a train approaching a crossing may be negligent, see third foot-note of *Russell v. Oregon R. & Nav. Co.* (Ore.), 33 R. R. R. 497, 56 Am. & Eng. R. Cas., N. S., 497.

‡See first foot-note of *Chicago, etc., R. Co. v. Bennett* (C. C. A.), 38 R. R. R. 671, 61 Am. & Eng. R. Cas., N. S., 671; foot-note of *Chicago, etc., Ry. Co. v. Smith* (Ark.), 37 R. R. R. 51, 60 Am. & Eng. R. Cas., N. S., 51.

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Railroads — Crossing Injuries — Contributory Negligence — Jury Question.§—In an action for injuries at a crossing, held, that whether plaintiff was guilty of contributory negligence in not looking for the train just before stepping onto the track was a jury question.

Appeal from Circuit Court, Meade County.

Action by Hettie Lyons against the Louisville, Henderson & St. Louis Railway company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. A. Miller, James R. Skillman, and C. M. Finn, for appellant.

Claude Mercer and N. McC. Mercer, for appellee.

CARROLL, J. In March, 1911, the appellee, Hettie Lyons, was struck by one of appellant's trains. To recover damages for the injuries received, she brought this action against the company, and on a trial before a jury recovered a verdict for \$2,000. A reversal of the judgment entered on this verdict is asked upon the ground that the trial court should have directed a verdict in favor of appellant. This is the only error complained of, and its consideration involves a somewhat detailed statement of the facts shown by the record and the law applicable thereto. The appellee lived in the town of Guston, in Meade county, on the line of the appellant's railroad. The depot at Guston is situated on the south side of the railroad, as is practically all of the town, which contains about 150 inhabitants, and it was on this side of the railroad Mrs. Lyons lived. Immediately across from the depot on the north side of the track, and close to it, there was a ditch made by the railroad company on its right of way, and across this ditch a plank bridge had been put in front of the depot for the use and accommodation of persons living on the north side of the railroad track as well as of persons who desired to go to and from that side. This bridge, which was about eight feet long and seven feet wide, had been there for many years; and, although it does not appear that the company built it, there is evidence that its employees at one time repaired it. And it is also shown that from 25 to 75 people walked across the track and over this bridge each day. It was at this bridge that appellee was struck just as she was in the act of going from it onto the track. On the morning she was injured she left her house, and, crossing the railroad track on this bridge to the north side, went to a smokehouse owned by Mr. Neff, who lived close to and on the north side of the track about 100 feet west of the de-

§See last foot-note of *Beech v. Missouri, etc., R. Co.* (Kan.), 41 R. R. R. 652, 64 Am. & Eng. R. Cas., N. S., 652; first head-note of *Bates v. San Pedro, etc., R. Co.* (Utah), 40 R. R. R. 413, 63 Am. & Eng. R. Cas., N. S., 413; foot-note of *Barthelmas v. Lake Shore, etc., R. Co.* (Pa.), 34 R. R. R. 378, 57 Am. & Eng. R. Cas., N. S., 378.

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pot. On her way home from the smokehouse, and after leaving the yard gate at Neff's house, she walked with her back to the approaching train in a path leading from Neff's gate to the bridge crossing that run rather parallel with the railroad and a few feet from it. She testifies that she did not hear the approach of the train or any bell ringing or the whistles that were sounded for the station or the road crossing west of it, and it is also in evidence that there was a strong wind blowing in a direction that would carry the noise of the approaching train and the sound of the signals from the place at which appellee was. She further said that, when she got on this path on her way towards the bridge crossing, she looked west in the direction in which this train was coming, but did not see it, and then proceeded to walk towards the track without stopping or looking again. The train which struck appellee consisted of an engine, two tenders, and two cars, and was going east. The train was running backwards; that is to say, the two tenders were in front of the engine, and the cars that the engine was pulling were coupled to the front end of the engine. There is some conflict in the evidence as to the speed of the train. The witnesses for appellee say that it was running about 35 miles an hour, while the trainmen say the speed was about 25 miles an hour. The weight of the evidence conduced to show that the engine bell was not ringing as the train approached the depot crossing although the trainmen say that it was. It is conceded that no whistle was sounded for this depot crossing except an alarm whistle about the time the appellee was struck, but several witnesses testified that they heard the usual station signal sounded several hundred feet west of the depot, and also the customary crossing signals for a public road crossing that was several hundred feet west of the depot. It is not seriously contended that the whistles were not sounded at these places; nor is it denied that the engineer was keeping a lookout, and he said he saw appellee while she was walking towards the track, but did not anticipate that she would get close enough to be struck by the train, and so did not sound the alarm whistle, or attempt to stop the train until about the time she was struck.

Upon this state of facts, it is the contention of counsel for the railroad company, first, that appellee was a trespasser; and, second, that she was guilty of such contributory neglect as should defeat a recovery in her behalf, while it is insisted for appellee that in going on the track at this place she was a licensee and entitled to the protection afforded licensees, and that the question of whether she was guilty of such contributory neglect as would defeat a recovery was properly left to the jury.

[1, 2] It is often a very difficult question to determine from the facts whether a person crossing or traveling on a railroad track at places other than public crossings is to be treated as a trespasser or a licensee, and the solution of this question in cases

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of this character is always important because of the difference in the duty owing by the company to trespassers and licensees. To the trespasser no duty is owing except to exercise ordinary care to avoid injury to him after his peril is discovered; while to the licensee—that is, a person having the right to use the track—there is due the duty of lookout, warning, and reasonable speed. So many persons using the tracks of railroad companies are injured and killed by moving trains that we have had occasion to consider questions like those here presented in a large number of cases; but it is rare that the facts in any two of them are precisely alike, so that each case must in a great measure be determined by the facts it presents, although there are certain general principles applicably to all cases of this class. Here the accident occurred immediately at one of appellant's passenger and freight depots at a place that was so habitually and continuously used as a crossing by the public that the appellee had the right as a licensee to use the track and right of way of the company in going from one side of the track to the other as she was doing when the injury happened. Of course, every path across a railroad track, although it may be used by many persons each day, does not put upon the company the duty of treating the users as licensees. It is a common thing to find such pathways at many places on every railroad, and, if the company was required to slow down and give warning at all of these places, it would unreasonably interfere with its use of its own premises and seriously impair its efficiency in the discharge of its public duties. *Chesapeake & Ohio Ry. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131. But the use of this crossing for many years by large numbers of the public had impressed it with the character of a public way, and so the company in the operation of its trains was required to anticipate the presence of travelers at this place, and to govern the movement of its trains accordingly. We are largely influenced to reach this conclusion by the fact that this place was in a small town, immediately in front of a regular passenger depot of the company, and where the company by permitting the plank bridge to be built and remain on its right of way for the use of the public had recognized the right of the public to use its tracks, in fact, invited them to do so; and, having done this, it cannot say that persons so using its track at this place were trespassers. There is no similarity whatever between the facts in this case and the facts in *Hughes v. L. & N. R. Co.*, 67 S. W. 984, 23 Ky. Law Rep. 2288, cited by counsel for appellant, and the *Hughes Case* is not at all in conflict with the views we have expressed.

[3] The next question is, in what respect was the company guilty of negligence? We have pointed out that the use of the track by the public at the time and place appellee was injured put upon the company the duty of anticipating the presence of

persons on the track, and this duty imposed upon those operating the train the further duty of keeping a lookout, giving warning of the approach of the train, and operating it at a reasonable rate of speed. And this duty was violated, not only by the speed at which the train was running, but especially by the failure to give warning by ringing the engine bell or sounding the whistle for this particular crossing. It is true the great weight of the testimony conduces to show that the usual station and crossing signals were given some 900 feet west of the depot, but these signals did not sufficiently discharge the duty the company owed to give warning of the approach of its trains to this depot crossing. It is true that the engineer was keeping a lookout, but the lookout alone did not satisfy the requirements we have imposed in cases of this character. The lookout answers one purpose, the warning another, and the control of the speed yet another; and it often happens that the observance of either without the observance of all will not afford the required or indeed any protection. The lookout is primarily to enable the trainmen to control the movement of the train when they discover danger, while the warning is to give the traveler notice to keep out of the way, and the control of the speed is designed to make both the lookout and the warning more effective. In this case, for example, the fact that the engineer was keeping a lookout did not do any good, as at the speed the train was going he did not discover the peril of appellee in time to warn her of danger or avoid the accident. In other cases, as in *C. & O. Ry. Co. v. Banks*, 144 Ky. 137, 137 S. W. 1066, it is the lookout that affords the most protection, and in others like *I. C. R. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. 352, it is the failure to run the train at a reasonable speed that most largely contributes to the accident. So that in one case the lookout may be the most important duty, while in another the warning may be the most important, and in yet another the rate of speed the most important. As a result of this condition, we have in a long line of cases ruled that the concurrent duty of lookout, warning, and reasonable speed must be observed, and that the failure to perform either one of these duties is actionable negligence when the failure is the proximate cause of the injury. We have here then a case in which the lookout duty was observed, but the requisite warning was not given and the speed of the train was not reasonable. But, passing the question of the speed of the train, it may safely be said that the company was negligent because of the failure of the trainmen to give warning of the approach of the train to this depot crossing.

[4] The fact, however, that the company was negligent in the particulars named does not fix liability upon it for the injury to appellee if she was guilty of such contributory neglect as that

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except for her negligence the accident would not have happened. C., N. O. & T. P. Ry. Co. v. Yocum, 137 Ky. 117, 123 S. W. 247, 1200.

[5] On the subject of appellee's negligence, the argument is made that the track on which the train was approaching was straight for a distance of seven or eight hundred feet west of the depot, and that, if appellee had exercised ordinary care to discover the approach of the train, she could not fail to have seen it before going on the track. Appellee, according to the uncontradicted evidence, did look in the direction the train was coming, when she was about 75 feet from the crossing, but, not seeing it or hearing it, she proceeded on her way. The reason she did not see the train when she looked is probably due to the fact that on account of a curve about 800 feet west of the station the train had not yet come in sight when she looked. After the train came around the curve and onto the straight stretch of track, between the curve and the depot, it was going at such a high rate of speed that it run the distance of 800 feet from the curve to the depot in about the same time it took appellee to go the 75 or 100 feet from the point where she looked to the crossing. Of course, if appellee had looked just before or as she stepped on the crossing bridge, she could have seen the train, which then only a few feet distant, and have avoided the injury. Now, was her failure to do this such contributory negligence as would defeat a recovery, or was it for the jury to say whether she exercised ordinary care to discover the approach of the train?

She testifies that her hearing was good, and that she did not hear the signals that were sounded for the station or the road crossing, or any bell ringing or the train coming, and that, when she looked and did not see any train, she believed the way was safe, and gave the matter no further attention. It is not, of course, to be assumed or indeed believed that appellee purposely put herself in the way of this train, or that she would have gone on the track if she had known the train was coming, and we think that, when she looked for the approaching train a short distance from the crossing and did not see or hear it, she had the right to assume that no train was coming, or that, if one was coming, it would give warning of its approach to the depot by ringing the bell; and that the jury were authorized under this state of facts to find, as they did, that appellee exercised ordinary care to discover the approach of this train. It is also a matter worthy of notice that it is usual and customary for all trains passing passenger depots to ring the engine bell, and there is evidence that this custom was followed at Guston, and appellee says that not hearing any bell or seeing any train she did not anticipate that any train was coming. It is also true that trains, although running at a high rate of speed, often make little noise, and persons who are in the habit of crossing the track at places where it is usual to ring

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the engine bell have the right to depend on this warning to give them notice, as the engine bell makes a sound that can often be heard much further than the sound made by the moving train. While as said in *C. & O. Ry. Co. v. Patrick*, 135 Ky. 506, 122 S. W. 820, "we do not mean to be understood as holding that one in crossing or going upon a railroad track where he is entitled to go or he should neglect the use of his faculties or fail to exercise any reasonable precaution that would enable a person of ordinary prudence under the circumstances to discover the approach or presence of a moving train and thereby prevent injury to his person * * *"—we yet think that, when appellee looked for this train at the time and place she did, she was not required again to stop or look or listen before going on the track, or conclusively guilty of negligence, because she went on the track without discovering the approach of the train.

A case in many of its features like this is that of *Davis v. L. H. & St. L. Ry. Co.*, 97 S. W. 1122, 30 Ky. Law Rep. 172. In that case Mrs. Davis was struck in the daytime by an engine at a place where she was licensed to use the track. The defense was made there, as it is here, that, although the employees of the company were negligent in failing to give warning of the approach of the train by ringing the bell, Mrs. Davis could have discovered its approach by the exercise of ordinary care and thereby have avoided injury to herself; and it was insisted that, because of her failure to discover its approach and keep off the track, she could not recover. But the court said: "It may be set down that when persons approach and attempt to cross a railroad track in cities and towns and public crossings where they have a right to cross, and where the presence on the track of persons should be anticipated, and when they will not be trespassers in so doing, they may rely upon the fact that some lookout will be kept or warning given of the approach of trains to the place; and, in the absence of any warning signal that a train is approaching, it is not conclusive evidence of negligence for the injured person to go upon the track, although by looking or listening an approaching train might be seen or heard, as it will not be assumed that a person will deliberately walk in front of a passing train. If the rule were adopted as a matter of law that a person could not recover who went upon a railroad track at a public crossing without observing an approaching train, when it might have been seen by looking or listening, although the company failed to give any warning signal of its approach, or keep any lookout, the result would be that in almost every case of personal injury the company, however remiss in its duty, would be exonerated from liability." To the same effect is *Perkins v. C. & O. Ry. Co.*, 123 Ky. 229, 94 S. W. 636, 29 Ky. Law Rep. 660. Another case very similar is *L. & N. R. Co. v. McNary*, 128 Ky. 408, 108 S. W. 898, 17 L. R. A. (N. S.) 224, 129 Am. St. Rep. 308. In that case, Mary McNary, a woman

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about 70 years old, was walking along a path that crossed the railroad track in a small mining town. She had on a bonnet, and was not looking for the train, and just as she walked on the track she was struck and killed by a fast passenger train. After setting up the facts showing that Mrs. McNary was a licensee in the use of the track at this place, the court, in answer to the contention of the railroad company that her own negligence in failing to exercise ordinary care to discover the approach of the train was the cause of the accident, said: "The woman manifestly could have seen the train if she had looked in that direction just before she went upon the track, but she had a right to assume that notice of the approach of a train would be given; and, where proper signals are not given, this court has held in a number of cases that the question whether the traveler used ordinary care is for the jury.

* * * To hold as a matter of law that the footman is guilty of contributory negligence barring a recovery for his injury whenever he goes upon a railroad track without stopping, looking, or listening would be practically to exempt railroads from all responsibility in cases of this sort; for there are few cases indeed where the footman, if he stopped, looked, or listened, could not save himself by stepping to one side and waiting for the train to pass. But the fact is that a person thinking of his own business is sometimes unmindful of where he is, and will get on the railroad track before he is aware of it, or he will from other causes be endangered from passing trains. So it is that in crowded localities, when the presence of persons on the track is to be anticipated, a lookout is required of those operating trains, and notice of their approach and such moderation of speed as will make a lookout and signals of the train's approach available for the safety of the traveling public. In each case the question whether the traveler used proper care will depend on a number of circumstances, such as the number of trains passing, the warning of the train's approach, and the circumstances surrounding him."

Many other cases announcing a similar rule might be cited, but we think these are sufficient to show that the evidence authorized the court to leave it to the jury to say whether or not the negligence of appellee or the company was the cause of the injury; and, as this and the other issues were properly submitted, the judgment is affirmed.

FARRIS *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 4, 1912.)

[96 N. E. Rep. 1098.]

Street Railroads—Injuries to Travelers—Crossing Accident—Contributory Negligence.*—Plaintiff's intestate, being about to drive across a street on which defendant's street car tracks were located in the center of the street, looked up and down the street for cars as soon as he could see along the street. He saw one approaching on the track nearest to him, but more than 150 feet from where he was crossing. He continued his way, the horse trotting or jogging, and, before he could get across, the car struck the rear end of the buggy. The car was moving at an unreasonable speed, and in violation of an ordinance providing that cars approaching any public or private way intersecting a railway track must reduce speed to such a rate as will make it possible to stop immediately. Held, that intestate was not negligent as a matter of law.

Street Railroads—Injuries to Travelers—Rights in Street.†—Neither a traveler crossing a street railway track nor a motorman in charge of a car has an exclusive right to the street, to which the other must yield, but both have the rights and duties of travelers on a common thoroughfare, so that the motorman is not entitled to expect that its right of way will be wholly unimpeded.

Evidence—Conclusiveness of Testimony.—Where, in an action for injuries in a street railway crossing accident, one of plaintiff's witnesses testified to facts, which if true, established that decedent was negligent as a matter of law, the evidence of such witness having been contradicted by other evidence, plaintiff was not concluded thereby.

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

*See last foot-note of *Strauchon v. Metropolitan St. Ry. Co.* (Mo.), 40 R. R. R. 669, 63 Am. & Eng. R. Cas., N. S., 669; *Blake v. Rhode Island Co.* (R. I.), 39 R. R. R. 792, 62 Am. & Eng. R. Cas., N. S., 792; first foot-note of *McGahey v. Citizens' Ry. Co.* (Neb.), 39 R. R. R. 242, 62 Am. & Eng. R. Cas., N. S., 242.

†For the authorities in this series on the subject of the right of way as between a street car and another vehicle or person, see first paragraph of second foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767.

For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see first foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; first foot-note of *Stewart v. Omaha, etc., R. Co.* (Neb.), 39 R. R. R. 298, 62 Am. & Eng. R. Cas., N. S., 298; last paragraph of first foot-note of *Thompson v. Albuquerque Tract. Co.* (N. Mex.), 38 R. R. R. 656, 61 Am. & Eng. R. Cas., N. S., 656.

Farris v. Boston Elevated Ry. Co

Action by Adelaide P. Farris against the Boston Elevated Railway Company. Judgment for plaintiff, and defendant brings exceptions. Overruled.

G. H. Mellen and C. R. Darling, for plaintiff.

E. P. Saltonstall, for defendant.

RUGG, C. J. This is an action for personal injuries received by the plaintiff's intestate while traveling with a horse and buggy on a public way in the evening, through collision with a car of the defendant. There was evidence tending to show that the accident occurred in Boston, on Columbus Avenue, which at this point was straight for more than a quarter of a mile and was about fifty-three feet wide between curbstones. Two tracks of the defendant ran in the middle part of the street. The plaintiff's intestate drove out of Davenport Street, which intersects Columbus Avenue on its easterly side, into Columbus Avenue, intending to cross the tracks to the westerly side of the street in order to go southerly on the avenue. There was a block on the southerly corner of Columbus Avenue and Davenport Streets, the distance from which to the nearest rail of the defendant was 50 feet, and as soon as the intestate could see past this block he looked up and down the street for cars and saw one approaching on the track nearer to him going northerly, but "beyond Benton Street," a street 150 feet from Davenport Street. He was reported to have said that he saw "the car was not a dangerous distance," and also that as he was coming from Davenport Street "he saw a car way up the street and he thought he had plenty of time to pass as the car was quite a distance." Other testimony was that the car was 75 yards away at that time.

The only evidence as to the speed of the horse was that it was either trotting or walking or jogging, but the driver did not urge it onward. There was no other car in sight and there was no traffic in the street except one wagon some distance away. The car struck the buggy on "the rear end," overturning it and injuring the plaintiff's intestate. There was a regulation of the Board of Aldermen of the city of Boston to the effect that "in approaching any public or private way intersecting that in which the railway is located the speed of the car must be reduced to such a rate as will make it possible to stop it immediately."

The jury found in answer to questions that the plaintiff's intestate was in the exercise of due care; that the gong was sounded before the accident; and that the car before the accident was being run at a reckless or unreasonable rate of speed.

[1, 2] The only question is whether as matter of law it can be said that the plaintiff's intestate was not in the exercise of due care at the time of the accident. Generally when a collision occurs between a street car and a horse-drawn vehicle at intersecting streets the question of due care of the driver of each is for the jury.

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Neither has an exclusive right to which the other must yield. Both have the rights and duties of travelers upon a common thoroughfare. The driver of the car, being limited to the tracks, while the driver of the horse-drawn vehicle has the freedom of the entire street, may expect that there will be no unreasonable obstruction of his narrow pathway. He has no right to expect that it will be wholly unimpeded. The distance of the car, when the plaintiff's intestate came in sight of it, is not proved to a certainty. It was "beyond" 150 feet, but how much beyond is not clear. It must now be taken as a fact that the car was coming at an unreasonable rate of speed. The plaintiff's intestate thought he had time to get across. Evidence to that effect was admitted without objection and has been treated as entitled to consideration. *Jeddrey v. Boston & Northern Street Railway*, 198 Mass. 232, 84 N. E. 316. That his judgment was not reckless is shown by the fact that it was the rear part of his wagon that was struck. A slight abatement of the unreasonable rate of speed, at which the jury found the car was going, might have averted the injury. It cannot be said that the deceased was bound to anticipate an unreasonable rate of speed by the car. Although the case is close and reaches almost to the verge, we incline to the view that there was evidence enough to take it to the jury, and that it is governed by *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104, 78 N. E. 381; *Sellon v. Boston Elevated Railway*, 208 Mass. 507, 94 N. E. 684; *Mullen v. Boston Elevated Railway*, 209 Mass. 79, 95 N. E. 391, and like cases rather than by *Cokinos v. Boston Elevated Railway*, 209 Mass. 225, 95 N. E. 89; *Tognazzi v. Milford & Uxbridge Street Railway*, 201 Mass. 7, 86 N. E. 799, 21 L. R. A. (N. S.) 309, and *Dunn v. Old Colony Street Railway*, 186 Mass. 316, 71 N. E. 557.

[3] The defendant in argument has relied strongly on the testimony of one eyewitness called by the plaintiff, that in his judgment the car was only twenty feet away when the horse left a place of safety and went into a place of danger. If this was the fact under the other conditions disclosed, the lack of due care of the decedent would have been plain. But this was not an admission by the decedent or by the plaintiff. It was simply an estimate of distance by a witness which the jury may not have regarded as accurate. It appears to have been contradicted by evidence as to the place of impact by the car upon the buggy.

Exceptions overruled.

LOUISVILLE RY. CO. *v.* SHEEHAN'S ADM'X.

(Court of Appeals of Kentucky, Jan. 10, 1912.)

[142 S. W. Rep. 221.]

Carriers—Passengers—Injuries after Alighting—Jury Question.—In an action for intestate's death by being struck by a street car at a crossing, after he had gotten off another car and was crossing the track, evidence held to make it a jury question whether the motorman was negligent in running his car at an unreasonable speed, or not having it under reasonable control, or failing to give notice of the car's approach.

Street Railroads—Negligence—Duty at Street Crossings.*—A street railroad company is required to lessen the speed of its cars at public street crossings, and give notice of their approach.

Street Railroads—Negligence—Keeping Lookout.†—The street car company must anticipate the presence of persons upon the track at any time and place, and keep a lookout ahead for them, and so control the cars as to protect them.

Evidence—Weight—Negative Testimony—Giving Signals. — The evidence of persons in a position to hear whether a street car gong was rung, that they did not hear it, is sufficient to take the question to the jury of whether such warning was given.

Death—Excessive Damages.—A verdict for \$5,000 for decedent's death by being struck by a street car was not excessive, where it appeared that he was 29 years of age when killed, was vigorous and active and working at \$2.28 a day.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by James J. Sheehan's administratrix against Louisville

*See last foot-note of *Sparr v. United, etc., Elect. Co. (Md.)*, 40 R. R. R. 430, 63 Am. & Eng. R. Cas., N. S., 430; fifth foot-note of *Acton v. Fargo, etc., Ry. Co. (N. Dak.)*, 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; first head-note of *United Rys., etc., Co. v. Kolken (Md.)*, 39 R. R. R. 52, 62 Am. & Eng. R. Cas., N. S., 52; first head-note of *Blue Grass Traction Co. v. Ingles (Ky.)*, 38 R. R. R. 205, 61 Am. & Eng. R. Cas., N. S., 205.

†See foot-note of *Kiley v. Boston Elev. Ry. Co. (Mass.)*, 40 R. R. R. 73, 63 Am. & Eng. R. Cas., N. S., 73; foot-note of *Flaherty v. Butte Elect. Ry. Co. (Mont.)*, 41 R. R. R. 110, 64 Am. & Eng. R. Cas., N. S., 110; first paragraph of sixth foot-note of *Acton v. Fargo, etc., Ry. Co. (N. Dak.)*, 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; first head-note of *United Rys., etc., Co. v. Kolken (Md.)*, 39 R. R. R. 52, 62 Am. & Eng. R. Cas., N. S., 52; second head-note of *Stewart v. Omaha, etc., R. Co. (Neb.)*, 39 R. R. R. 298, 62 Am. & Eng. R. Cas., N. S., 298; second head-note of *Smith v. Southern Pac. Co. (Ore.)*, 39 R. R. R. 600, 62 Am. & Eng. R. Cas., N. S., 600; first foot-note of *Wilson v. Illinois Cent. R. Co. (Iowa)*, 39 R. R. R. 282, 62 Am. & Eng. R. Cas., N. S., 282; last head-note of *Ft. Smith & W. R. Co. v. Messek (Ark.)*, 40 R. R. R. 46, 63 Am. & Eng. R. Cas., N. S., 46.

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Railway Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Alfred Selligman, Fairleigh, Straus & Fairleigh, and Howard B. Lee, for appellant.

Bennett H. Young, for appellee.

WINN, J. James J. Sheehan, on the morning of December 29, 1910, was a passenger on a west-bound car of the appellant company, on Portland avenue, in Louisville, Ky. At the intersection of Twenty-Second street, he alighted upon the north side of the street, and started across the street to the south side, when he was struck and killed by an east-bound car of the company on Portland avenue. His wife qualified as his administratrix and brought an action in the Jefferson circuit court against the company for his death. The petition charges the negligence in general terms, and does not set out the specific acts of negligence of the defendant company upon which the right of recovery was based. Issue was joined upon this charge, a charge of contributory negligence was interposed, issue joined upon it, and a trial had, which resulted in a verdict of \$5,000 in favor of the plaintiff. From the judgment thereon, this appeal is prosecuted.

[1] Appellant makes no complaint of the instructions given, nor the admission or rejection of testimony, nor of any error of law arising upon the trial. Its only position is that the verdict is not supported by any evidence going to establish that the motor-man failed to run his car at a reasonable rate of speed, or to have it under reasonable control, or to give any seasonable notice of the approach of the car. We have made a careful examination of the testimony in order to ascertain whether the record discloses any evidence upon which the court was warranted in submitting these features of the case to the jury. We find this testimony in the record:

Matt Collins testifies that the car was going 12 to 15 miles an hour; and that the excessive speed of the car carried the decedent 38 steps before it came to a stop. Loula Herbert testifies that the car was going tolerably fast as it approached the crossing—just the same as it went between the squares. Robert Black testifies that the car was going pretty fast, and ran nearly 100 feet from the time it struck Sheehan until it stopped. Bryant Bland testifies that the car was going at fast speed in approaching the crossing, and did not change its rate of speed. John Edward Kelly testifies to the same facts. Miss Stella Jett testifies that the car was going fast. Carl M. Barmore testifies that the car did not slow up any as it approached the crossing. William Watts testifies to the same effect. Sundry witnesses for the plaintiff testified that the car stopped opposite a brick house, which, according to the testimony of Virgil Holvogt, an employee of the Louisville city engineer's

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office, was 135 feet, as measured by him, from the west side of Twenty-Second street. A number of witnesses testify that they heard no bell or gong upon the car as it approached the crossing.

[2, 3] It is proper to say that much, if not all, of this testimony is contradicted by the testimony for the company; but the testimony above outlined for the plaintiff was beyond question sufficient to take the case to the jury. These facts, if true, brought the case within the declaration of *Whitman's Administrator v. Louisville Railway Company*, 134 Ky. 6, 119 S. W. 165, where it is said that the railway company is required to moderate the speed of its cars at public crossings, and to give notice of their approach by proper signals; and within the case of *Leach v. Owensboro City Railway Co.*, 137 Ky. 292, 125 S. W. 708, where it is said that the presence of persons upon the track must be anticipated at any time or place, and that it is the duty of those operating the street cars to keep a lookout ahead for such persons, and to so run and control the cars as not to injure people crossing the track.

[4] It is true that the testimony for the plaintiff as to the failure of the bell to ring was largely negative, but the rule is that the testimony of those who were in position to hear and did not hear such signals is sufficient to take the case to the jury upon the question of whether they were or were not given.

[5] Sheehan was 29 years of age, was working at \$2.28 per day, and was vigorous and active. Plainly, therefore, the verdict was not excessive in amount.

Since, therefore, there was sufficient evidence to take the case to the jury, and since the careful review asked for by the appellant has not convinced us that the verdict was flagrantly against the evidence, or the result of passion or prejudice, and since the record discloses a supersedeas, the judgment should be and is affirmed, with damages.

KEAN *v.* NEW YORK CENT. & H. R. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 3, 1912.)

[97 N. E. Rep. 64.]

Master and Servant—Injuries to Servant—Release.*—Where plaintiff's contract of employment with a sleeping car company contained a release from liability for injuries sustained in the course of the employment, and provided that it should inure to the benefit of railroad companies over which the company's cars were transported, such release constituted a defense to an action by plaintiff against a railroad company transporting a car on which he was engaged for injuries sustained by the negligence of the railroad company's employees.

Master and Servant—Contract of Employment—Release of Liability for Injuries—Question for Jury.—Whether plaintiff's signature to a contract of employment containing a release of the master's liability for injuries to the servant in the course of his employment, and also providing that it should inure to the benefit of any railroad company over which the master's cars were transported, was procured by fraudulent representations and concealment of its contents, held for the jury.

Railroads—Injuries to Licensees—Contributory Negligence.†—Where plaintiff, a Pullman car cleaner and filler, was engaged in filling the tank of a sleeping car, having gone to the roof with a hose for that purpose according to his usual custom relying on an alleged custom of conductors of switching crews to notify him when the car was about to be moved, and he was thrown from the car and injured by an engine striking it without warning, he was not negligent as a matter of law in not constantly interrupting his work to watch for the approach of an engine, and in relying on the customary warning.

Railroads—Injuries to Licensees—Warning—Evidence.—In an action against a railroad company for injuries to a sleeping car employee while engaged in filling a tank from the roof of a car by its being struck by a switch engine without warning, evidence that it was customary for the conductor of the switching crew to warn em-

*See last paragraph of last foot-note of *Denver, etc., R. Co. v. Whan* (Colo.), 23 R. R. R. 70, 46 Am. & Eng. R. Cas., N. S., 70.

†See second foot-note of *St. Louis, etc., R. Co. v. Funk* (Ark.), 41 R. R. R. 120, 64 Am. & Eng. R. Cas., N. S., 120; first head-note of *Stewart v. Portland Ry., etc., Co.* (Ore.), 40 R. R. R. 794, 63 Am. & Eng. R. Cas., N. S., 794; last paragraph of last foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; last foot-note of *Arkansas, etc., Ry. Co. v. Graves* (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259; first foot-note of *Hillis v. Spokane, etc., R. Co.* (Wash.), 38 R. R. R. 744, 61 Am. & Eng. R. Cas., N. S., 744.

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ployees engaged on the top of such cars before shifting them was admissible.

Trial—Failure to Produce Witness—Question for Jury.—What, if any, inference should be drawn against a party for an unexplained failure to produce a witness, is for the jury.

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by Michael Kean against the New York Central & Hudson River Railroad Company. Plaintiff recovered a verdict, and defendant brings exceptions. Overruled.

Plaintiff was employed by the Pullman Company to wash and fill cars while they were in the yards under a contract providing that plaintiff assumed all risks of accidents or casualties by railway travel or otherwise incident to his employment and service and by the contract did release, quit, and discharge the Pullman Company from any claims for liability of any nature or character whatsoever on account of any personal injury or death to him in such employment and service, and that such release should extend to and be for the benefit of railroad companies over which its cars should be transported. Plaintiff was engaged in filling a Pullman car in defendant's yards, and, while doing so, was injured by being thrown from the top of the car by one of its engines striking it without warning to plaintiff.

Coakley & Sherman, D. H. Coakley, and W. M. Hurd, for plaintiff.

Johnson, Clapp & Underwood, for defendant.

DE COURCY, J. [1, 2] 1. The plaintiff's contract of employment with the Pullman Company enured to the benefit of the defendant; and the release contained therein constituted a defense to this action unless the plaintiff's signature was obtained fraudulently. This was taken for granted at the trial and the judge so instructed the jury. The evidence in favor of the plaintiff on this issue of fraud was that after he had worked two hours he was called into the office of Mr. Ahearn, the general foreman of the Pullman Company, and the paper was passed to him for his signature. The plaintiff further testified as follows: "I picked it up to see what it was. 'Oh,' Ahearn says, 'lay it down.' 'Sign your name to that,' he said, 'it is an application for work and that is all I have to say about it.' He said the paper was only an application for work, and nothing more. When I started to read it, he slapped it down on the desk, that I was supposed to sign my name to it. He told me to sign my name to it and go back to work. * * * I thought I was signing the application under which I was going to work." This evidence, although contracted, entitled the plaintiff to go to the jury on his claim that the release was procured by fraudulent misrepresentations and

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concealment of its contents, and consequently not binding upon him. *Bliss v. New York Central & Hudson R. R. R.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; *Larsson v. Metropolitan Stock Exchange*, 200 Mass. 367, 86 N. E. 940.

[3] 2. There was evidence of the plaintiff's due care. The jury would be warranted in finding that he had just filled with water the rear tank on the forward car, and that when he was bending over to pull out the hose an engine with a baggage car attached to it came from behind and bumped violently into the car on which he was standing; that no bell was rung or other signal given of the engine's approach; that this train on which he was when injured usually arrived in Boston at half past 3 in the afternoon, and oftentimes was left standing on this main track overnight, before being switched over on another track. There was evidence that it was customary for all conductors of switching crews to investigate whether any men were working on top of cars that were about to be moved, and to warn such men to get off, before giving the signal to couple on an engine. The plaintiff testified that before the day of this accident the conductor always notified him to get down when they were about to shift the car upon which he was working, and that no such warning was given at this time. He also testified that the ladder by which he mounted was standing at the forward end of the car, where the conductor presumably could see it. We cannot say, as matter of law, that the plaintiff was careless in not constantly interrupting his work to watch for the approach of an engine, and in relying upon the customary warning. *Meadowcroft v. N. Y., N. H. & H. R. R.*, 193 Mass. 249, 79 N. E. 266; *Hines v. Stanley G. I. Electric Manuf. Co.*, 199 Mass. 522, 85 N. E. 851..

[4] 3. The testimony of Joyce and Burke was rightly admitted. It tended to prove a custom to give warning to men who were working on top of cars before a shifting engine was attached. *Rafferty v. Nawn*, 182 Mass. 503, 65 N. E. 830; *Hines v. Stanley G. I. Electric Manuf. Co.*, *ubi supra*.

[5] 4. At the close of the charge the defendant requested the court to give the additional instruction numbered 12. In view of the plaintiff's argument, something might well have been said to the jury on the subject of absent witnesses, but the instruction could not properly be given in the terms requested. It was for the jury and not for the court to decide what if any inference should be drawn, and against which party, from the failure to produce as a witness the man who wrote the statements of the witnesses Joyce and Burke. *Harriman v. Reading & Lowell Electric Ry.*, 173 Mass. 28, 53 N. E. 156.

The foregoing disposes of all the questions raised by the defendant's exceptions and insisted upon in this court.

Exceptions overruled.

MORRISSEY v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 3, 1912.)

[97 N. E. Rep. 83.]

Street Railroads—Injuries from Collision—Jury Question—Negligence.—There was evidence justifying a finding that the motorman was running the car slowly because of congested traffic, and that plaintiff's team was going in the same direction a short distance ahead of the car and in plain view, and apparently about to cross a cross street, when the motorman, without ringing the gong, turned on a switch into the cross street crossing plaintiff's way and ran the car into the wagon behind the forward wheel. Held, that the question of negligence in an action for resulting damage was for the jury, though defendant's witnesses testified that the wagon ran into the car.

Street Railroads—Injuries—Contributory Negligence.*—The driver of a team moving ahead of a slowly moving street car could assume that the motorman would sound the gong before changing the course of the car and crossing the path of his team.

Exceptions from Superior Court, Suffolk County; Marcus Morton, Judge.

Action by James F. Morrissey, administrator, against the Boston Elevated Railway Company. Verdict directed for defendant, and plaintiff excepts. Exceptions sustained.

Chas. W. Bartlett, Jos. W. Bartlett, Fredk. E. Jennings, and Arthur T. Smith, for plaintiff.

E. P. Saltonstall, for defendant.

DE COURCY, J. This action was brought by William E. Morrissey to recover for personal injuries; and he is hereinafter referred to as the plaintiff although the action is now being prosecuted by his administrator. The collision complained of occurred between six and seven o'clock in the evening of January 31, 1908, at the corner of Dorchester avenue and West Fourth street in South Boston. The defendant company maintained double tracks in both streets. At the time of the accident cars were running southerly on Dorchester avenue as often as once a minute, more than one half of them proceeding straight down the avenue and the others turning into West Fourth street by means of a switch and curved track. On the avenue the nearest westerly rail was twelve feet from the curbstone, and the curved

*See last foot-note of preceding case.

Morrissey v. Boston Elevated Ry. Co

rail, in turning the corner into West Fourth street, approached to within three feet of the curb.

The plaintiff was driving a two-horse, covered express wagon and was going southerly along Dorchester avenue, with his right-hand wheels close to the curb of the westerly sidewalk, when the collision occurred.

The trial court directed a verdict for the defendant. The question before us is whether, upon the view of the testimony most favorable to the plaintiff, there was evidence of his due care and of the motorman's negligence proper for the consideration of the jury. *Sellon v. Boston Elev. Ry. Co.*, 208 Mass. 507, 94 N. E. 684.

[1] There was evidence on which the jury would be warranted in finding that the motorman was driving his car slowly on account of the congested traffic; that the plaintiff's team was proceeding in the same direction, a short distance ahead of the car and in plain sight, and apparently about to cross West Fourth street; and that the motorman, without ringing any warning gong, entered upon the curved track which crossed the plaintiff's path and ran the car into the wagon behind the forward left wheel. This made the question of the defendant's negligence one of fact for the jury, notwithstanding that the witnesses called by it testified that the wagon ran into the car.

Although the case is closer on the issue of the plaintiff's due care, this question also was for the jury on the testimony of his witnesses. Upon their story we have virtually a rear end collision, with no warning signal of the car's approach. *Kerr v. Boston Elevated Ry.*, 188 Mass. 434, 74 N. E. 669; *Callahan v. Boston Elev. Ry.*, 205 Mass. 422, 91 N. E. 388. [2] There is no direct evidence that the plaintiff listened, but he might well assume that the motorman would sound the gong before changing the course of the car and attempting to cross the path of the team. And if any duty to look devolved upon the plaintiff under the circumstances, the jury might consider that his look should be forward towards the intersecting street which he was approaching. According to some of the evidence, even if he had looked backward when the horses reached the curved track, he would have seen the car on the straight track and apparently proceeding as if to cross West Fourth street. And on the plaintiff's version of the accident the collision would not have occurred if the car had remained on the straight track.

Exceptions sustained.

SMITH'S ADM'R v. CINCINNATI, N. O. & T. P. Ry. Co. et al.

(Court of Appeals of Kentucky, Feb. 2, 1912.)

[142 S. W. Rep. 1047.]

Railroads—Operation of Trains—Care Required.*—An engineer, who keeps a lookout, and who gives warnings of the approach of a train, may assume that a person will heed the warnings and keep out of the way of the train, and he need not stop the train until it becomes reasonably apparent that such person is oblivious of the danger.

Railroads—Operation of Trains—Care Required — Speed.†—As a railroad company operating its trains in incorporated towns where the public habitually uses its tracks as a footway must keep a lookout and give timely warning of the approach of trains and have them under reasonable control, it is actionable negligence to run a train at from 40 to 45 miles an hour at such a place.

Railroads—Injuries to Persons on Tracks—Negligence—Contributory Negligence.‡—Where a railroad company ran its train at an

*See first foot-note of *Morton v. Southern Ry. Co. (Va.)*, 41 R. R. 758, 64 Am. & Eng. R. Cas., N. S., 758; second foot-note of *Plinkiewisch v. Portland, etc., Power Co. (Ore.)*, 40 R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; fourth head-note of *Exum v. Atlantic, etc., R. Co. (N. C.)*, 40 R. R. 460, 63 Am. & Eng. R. Cas., N. S., 460; last head-note of *Levy v. Houghton County St. Ry. Co. (Mich.)*, 40 R. R. 1, 63 Am. & Eng. R. Cas., N. S., 1; *Norfolk, etc., R. Co. v. Overton (Va.)*, 39 R. R. 271, 62 Am. & Eng. R. Cas., N. S., 271; second head-note of *Adams v. Arkansas, etc., R. Co. (La.)*, 39 R. R. 254, 62 Am. & Eng. R. Cas., N. S., 254.

†See last foot-note of *Schwanenfeldt v. Chicago, etc., R. Co. (Neb.)*, 29 R. R. 238, 52 Am. & Eng. R. Cas., N. S., 238; first head-note of *Hollins v. New Orleans, etc., R. Co. (La.)*, 28 R. R. 288, 51 Am. & Eng. R. Cas., N. S., 288; second foot-note of *Cincinnati, etc., Ry. Co. v. Commonwealth (Ky.)*, 27 R. R. 616, 50 Am. & Eng. R. Cas., N. S., 616; first head-note of *Holmes v. Missouri Pac. Ry. Co. (Mo.)*, 27 R. R. 551, 50 Am. & Eng. R. Cas., N. S., 551.

For the authorities in this series on the question whether any rate of speed of a railroad train in a city or other municipality may constitute negligence, see last paragraph of first foot-note of *Louisville, etc., R. Co. v. Bays (Ky.)*, 40 R. R. 86, 63 Am. & Eng. R. Cas., N. S., 86; last paragraph of foot-note of *Illinois Cent. R. Co. v. Flaherty (Ky.)*, 37 R. R. 404, 60 Am. & Eng. R. Cas., N. S., 404.

‡For the authorities in this series on the question of proximate cause where the person injured by a train or street car was negligence in going upon track and the train or car was being operated at an unlawful or negligent speed, see first foot-note of *Dubose v. New Orleans Ry., etc., Co. (La.)*, 37 R. R. 262, 60 Am. & Eng. R. Cas., N. S., 262; last paragraph of first foot-note of *Illinois Cent. R. Co. v. Sumrall (Miss.)*, 35 R. R. 585, 58 Am. & Eng. R. Cas., N. S., 585.

For the authorities in this series on the subject of concurrent negligence, see last paragraph of first foot-note of *Hammers v. Colo-*

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excessive speed over a track within an incorporated town where the public habitually used the track, and a person struck by the train was guilty of negligence in going on the track in front of the approaching train, the injury was the result of the concurrent negligence of both, and there could be no recovery.

Railroads—Accidents on Tracks—Care Required of Persons Entering Tracks.§—Where the presence of persons on a railroad track and the passing of trains might be reasonably anticipated, the company and a traveler were under reciprocal duties, the company to keep a lookout, give reasonable warning of the approach of the train, and have the train under reasonable control, and the traveler to use ordinary care to learn of the approach of the train and keep out of its way.

Railroads—Accidents on Tracks—Care Required of Persons Entering Tracks.||—A deaf person, who approaches a railroad track within

rado, etc., R. Co. (La.), 41 R. R. R. 414, 64 Am. & Eng. R. Cas., N. S., 414; last foot-note of Plinkiewisch *v.* Portland R., etc., Co. (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; last head-note of Exum *v.* Atlantic C. L. R. Co. (N. Car.), 40 R. R. R. 460, 63 Am. & Eng. R. Cas., N. S., 460; Central of Georgia R. Co. *v.* Blackmon (Ala.), 39 R. R. R. 292, 62 Am. & Eng. R. Cas., N. S., 292.

§For the authorities in this series on the subject of the duties of trainmen to licensees or trespassers on railroad tracks before their presence is discovered by trainmen, see first paragraph of foot-note of St. Louis, etc., R. Co. *v.* Williams (Ark.), 41 R. R. R. 786, 64 Am. & Eng. R. Cas., N. S., 786; first foot-note of Myers *v.* Chicago, etc., R. Co. (Iowa), 41 R. R. R. 770, 64 Am. & Eng. R. Cas., N. S., 770; second foot-note of Chesapeake, etc., R. Co. *v.* Banks (Ky.), 41 R. R. R. 667, 64 Am. & Eng. R. Cas., N. S., 667; last foot-note of Baltimore, etc., R. Co. *v.* Welch (Md.), 41 R. R. R. 617, 64 Am. & Eng. R. Cas., N. S., 617; last foot-note of Spizale *v.* Louisiana Ry. & Nav. Co. (La.), 41 R. R. R. 256, 64 Am. & Eng. R. Cas., N. S., 256; foot-note of Southern Ry. Co. *v.* Wiley (Va.), 40 R. R. R. 473, 63 Am. & Eng. R. Cas., N. S., 473; first foot-note of Louisville & N. R. Co. *v.* Bays (Ky.), 40 R. R. R. 86, 63 Am. & Eng. R. Cas., N. S., 86; Central of Georgia Ry. Co. *v.* Blackmon (Ala.), 39 R. R. R. 292, 62 Am. & Eng. R. Cas., N. S., 292; foot-note of Shields *v.* Southern Pac. Co. (Ore.), 39 R. R. R. 166, 62 Am. & Eng. R. Cas., N. S., 166; Birmingham Southern R. Co. *v.* Fox (Ala.), 37 R. R. R. 407, 60 Am. & Eng. R. Cas., N. S., 407.

For the authorities in this series on the subject of the care to be exercised by a highway traveler to discover an approaching train before going upon railroad tracks, see first foot-note of Beech *v.* Missouri, etc., R. Co. (Kan.), 41 R. R. R. 652, 61 Am. & Eng. R. Cas., N. S., 652; second foot-note of Philadelphia, etc., R. Co. *v.* Buchanan (Del.), 40 R. R. R. 23, 63 Am. & Eng. R. Cas., N. S., 23; Mississippi Cent. R. Co. *v.* Hanna (Miss.), 40 R. R. R. 14, 63 Am. & Eng. R. Cas., N. S., 14; Bates *v.* San Pedro, etc., R. Co. (Utah), 40 R. R. R. 413, 63 Am. & Eng. R. Cas., N. S., 413; fourth head-note of Heinz *v.* Baltimore & O. R. Co. (Md.), 38 R. R. R. 172, 61 Am. & Eng. R. Cas., N. S., 172; first head-note of Brommer *v.* Pennsylvania R. Co. (C. C. A.), 38 R. R. R. 51, 61 Am. & Eng. R. Cas., N. S., 51.

||For the authorities in this series on the subject of the contributory negligence of deaf persons in walking on or crossing railroad tracks, see second foot-note of Osteen *v.* Southern Ry. Co. (S. Car.), 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300; last para-

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an incorporated town at a place where the public habitually uses the track, must use his eyesight in the exercise of ordinary care to learn of the approach of the train, and, where he does not look and is injured by a train which he could have seen had he looked, he is guilty of contributory negligence.

Railroads—Accidents on Tracks—Care Required of Persons Entering Tracks.¶—A traveler approaching a railroad track habitually used by the public must look, and where there is a clear, unobstructed view, looking in each direction may be all that is necessary in the exercise of ordinary care; but in other cases, in view of the circumstances, the traveler must also stop and look, or stop and listen, or look and listen or, stop, look, and listen.

Appeal from Circuit Court, Boyle County.

Action by Asbury Smith's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Robert Harding and *B. F. Procter*, for appellant.

Charles H. Rodes, *George E. Stone*, and *John Galvin*, for appellees.

CLAY, C. Asbury Smith was struck and killed on December 21, 1907, by a train operated by the Cincinnati, New Orleans & Texas Pacific Railway Company. Charging that his death was due to the negligence of the railway company and its conductor, Thomas Quinlan, and its engineer, John Knosk, his administrator brought this action to recover damages. Upon motion of the defendants at the conclusion of all the evidence, the court peremptorily instructed the jury to find for them. Judgment was entered accordingly, and the administrator appeals.

The intestate was 26 years of age, and a deaf mute. He was a student at the Kentucky School for the Deaf at Danville. On

graph of foot-note of *Adams v. Boston, etc., Ry. Co. (Mass.)*, 21 R. R. R. 70, 44 Am. & Eng. R. Cas., N. S., 70.

¶For the authorities in this series on the question whether a highway traveler must stop to look and listen for trains before attempting to cross railroad tracks, see last paragraph of foot-note of *Mississippi Cent. R. Co. v. Hanna (Miss.)*, 40 R. R. R. 14, 63 Am. & Eng. R. Cas., N. S., 14; last foot-note of *Chicago, etc., Ry. Co. v. Bennett (C. C. A.)*, 38 R. R. R. 671, 61 Am. & Eng. R. Cas., N. S., 671.

For the authorities in this series on the subject of the care required of a highway traveler to discover the approach of a train at a crossing where his view of the tracks is obstructed, see last foot-note of *Beech v. Missouri, etc., R. Co. (Kan.)*, 41 R. R. R. 652, 64 Am. & Eng. R. Cas., N. S., 652; third paragraph of first foot-note of *Bates v. San Pedro, etc., R. Co. (Utah)*, 40 R. R. R. 413, 63 Am. & Eng. R. Cas., N. S., 413; sixth head-note of *Philadelphia, etc., R. Co. v. Buchanan (Del.)*, 40 R. R. R. 23, 63 Am. & Eng. R. Cas., N. S., 23; fourth head-note of *Wilson v. Illinois Cent. R. Co. (Iowa)*, 39 R. R. R. 282, 62 Am. & Eng. R. Cas., N. S., 282.

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the day of the accident, he boarded appellee's midday train at Danville for the purpose of going to Junction City and there taking passage via the Louisville & Nashville Railroad for his home in Bowling Green, Ky. Junction City is a town of about 900 inhabitants, and, being the junction of the Cincinnati, New Orleans & Texas Pacific Railway and the Louisville & Nashville Railroad, a large number of trains pass there daily. These two roads cross each other at right angles; the former running north and south, and the latter running east and west. Both roads use the same depot which is situated in the northeast angle of the two roads. In the northwest angle is the signal tower, a two-story building about 15 feet and 3 inches wide. From the east side of the tower to the west rail of the Cincinnati, New Orleans & Texas Pacific track the distance is 15 feet. In the southeast angle of the tracks is the Tribble House, a hotel, and in the southwest angle is the McCullom House, another hotel. The west side of the McCullom House is several feet west of the tower. There is a well-defined pathway leading from the McCullom House along the side of the Louisville & Nashville track and across the Cincinnati, New Orleans & Texas Pacific track to the depot, which is situated in the northeast angle of the two roads. In proceeding from the McCullom House along the pathway, there is nothing to obstruct the view of a train approaching from the north on the Cincinnati, New Orleans & Texas Pacific Railway, until the tower is reached. Then the view is obstructed for the space of 15 feet and 3 inches. When the tower is passed, the view of the track is unobstructed, and an approaching train may be seen for a distance of several hundred feet.

The intestate reached Junction City shortly after 11 o'clock a. m. He got off the train at the depot, and proceeded to the McCullom House to get something to eat. After procuring a ham sandwich, he came out of the hotel, and walked north across the Louisville & Nashville track for a distance of 30 feet. He then turned to the east, and, taking the footpath, proceeded in the direction of the Cincinnati, New Orleans & Texas Pacific track. While crossing this track, he was struck by fast, south-bound passenger train No. 1. All the witnesses testify that the whistle of the engine on this train was blown for the station. It was also blown for the board. The train was not required to stop at the crossing, as the crossing was equipped with a derailing switch. The whistle also blew for the Shelby street crossing, and, when the intestate was about to step or leap on the track in front of the approaching train, the danger or distress signal was sounded. The train had whistled for the station while the intestate was in the hotel. The other signals were given after he came out. As he proceeded north, the train was in view. As he proceeded east, it was also in view except for the time he was behind the tower. As the train approached, the bell was being

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rung, and the engineer was at his post of duty. The footpath between the hotel and the depot was traveled daily by a large number of persons, including passengers. Junction City is an incorporated town. There was sufficient evidence to show that the place was one where the presence of persons crossing the track might have been reasonably anticipated. The train was running at about 40 or 45 miles an hour. It was a through train, and did not stop at the station. When the intestate approached the track at right angles, he was looking east and did not turn his eyes toward the approaching train, which was within a few feet of him. Two or three persons attempted to attract his attention to the approaching train by making motions and calling to him. One person present attempted to catch him just as he went upon the track. According to some of the witnesses, he stepped upon the track and was struck by the train just before he got across. According to other witnesses, he leaped into the middle of the track, and was just in the act of making a second leap when he was struck. When he attempted to cross, the train was right on him.

[1] As the engineer had the right to assume that the intestate would heed the warning of the approaching train and keep out of its way, it was not incumbent on him to stop the train until it became reasonably apparent that the intestate was oblivious of the danger. This did not appear until after the intestate emerged from behind the tower, and attempted to cross the track. It is therefore manifest that intestate's peril could not have been sooner discovered, and that no power on earth could have stopped the train, after his peril was discovered, in time to avoid the injury. That being true, and the evidence further showing that a lookout was kept, and that reasonable warning of the approach of the train was given, it follows that the only negligence with which appellee may be justly charged is the excessive speed of the train; and it is for this negligence counsel for appellant insist the case should have been submitted to the jury.

[2] This court is committed to the doctrine that it is the duty of a railroad company in incorporated towns, where the public habitually uses its tracks and right of way as a footway, and the presence of persons on such tracks may therefore be reasonably anticipated, to operate its trains with the presence of such persons in mind; that is, to keep a lookout, to give timely warning of the approach of trains, and to have them under reasonable control. *I. C. R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.), 352; *L. & N. R. R. Co. v. McNary's Adm'r*, 128 Ky. 420, 108 S. W. 898, 17 L. R. A. (N. S.), 224, 129 Am. St. Rep. 308. We therefore conclude that appellee was negligent in running its trains at a speed of from 40 to 45 miles an hour.

[3] But this conclusion is not decisive of the case, for the rule

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is that where the railroad company is guilty of negligence in running its train too fast, and the party injured or killed is himself negligent in going upon the track in front of the approaching train, the injury is the result of the concurrent negligent of both parties, and there can be no recovery for the negligence of the railroad company, because, but for the negligence of the party injured, he would not have been injured. *Hummer's Ex'x v. Louisville & Nashville R. R. Co.*, 128 Ky. 492, 108 S. W. 885, 32 Ky. Law Rep. 1315. The same rule is laid down in *Southern Railway in Ky. v. Winchester's Ex'x*, 127 Ky. 144, 105 S. W. 167, 32 Ky. Law. Rep. 19.

[4] The question then is: Was the intestate guilty of contributory negligence? The accident happened at a time and place not only where the presence of persons on the railroad track might have been reasonably anticipated, but the passing of trains might have been reasonably anticipated. Therefore the same rule applies as in the case of a street crossing where the railroad and traveler are under reciprocal duties, requiring the railroad on the one hand to keep a lookout, to give reasonable warning of the approach of the train, and to have the train under reasonable control; and requiring the traveler, on the other hand, who is about to cross the track, to use ordinary care to learn of the approach of the train and keep out of its way. *Southern Railway in Kentucky v. Winchester's Ex'x*, supra.

[5] Now, what is "ordinary care," under such circumstances, on the part of a person totally deaf? How may he learn of the approach of a train? Three of his senses are not available at all for such a purpose. His fourth sense, that of hearing, is entirely gone. Therefore he must use his eyes—he must look. In other words, the duty of using ordinary care to learn of the approach of a train imposes upon the traveler the duty of using the only means by which he can discover its approach.

[6] Nor is there anything in this rule that conflicts with the attitude of this court towards the "stop, look, and listen" doctrine. That doctrine has never been followed in this state, because it exacts too high a degree of care in the part of the traveler. Under that rule, the traveler must do three things: He must stop. He must look. He must listen. There are times, however, when the requirements of ordinary care may be satisfied with less. Thus in approaching a railroad track, where there is a clear, unobstructed view of the track for several hundred feet in each direction, a jury may well conclude that looking in each direction is all that is necessary. In other cases they may conclude that ordinary care required the traveler to stop and look, or to stop and listen, or to look and listen, or to stop, look, and listen, depending on the peculiar circumstances of the case. While for this reason, therefore, we have refused to adopt the "stop, look, and listen" rule, we have never held that a traveler, who made no

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effort of any kind to discover the approach of a train, exercised ordinary care for his own safety.

All the witnesses agree that the intestate never raised his eyes or looked in the direction from which the train was coming. Had he done so, he would have seen the approaching train. That being true, and having failed to use his eyes, when they alone could have made him aware that the train was approaching, he was necessarily guilty of contributory negligence, for, notwithstanding the negligence of appellee in running its trains too fast, he would not have been injured had he not gone upon the track immediately in front of the train without making the slightest effort to discover its approach. We therefore conclude that the trial court properly directed a verdict in favor of the defendants.

Judgment affirmed.

KRAUT *v.* PUBLIC SERVICE RY. CO.

(Court of Errors and Appeals of New Jersey, Nov. 20, 1911.)

[81 Atl. Rep. 751.]

Street Railroads—Operation—Rights in Streets.*—The general principle governing the relation of the street railway to the traveling public is that their respective rights in the public highway must be exercised by each of them, with due regard to the rights of the other, in a reasonable and duly careful manner.

Street Railroads—Operation—Control of Car.†—It is the duty of the motorman of a street railway car, when approaching a crosswalk, to have his car so far under control that he will not endanger the safety of pedestrians engaged in the lawful and customary use of such crosswalk.

Street Railroads—Operation—Actions for Injuries—Question for Jury—Negligence of Defendant.—Where the plaintiff, who was walking upon a crosswalk of a public highway, was struck by a street railway car, running at a "pretty fair rate of speed," as he was passing over the last rail of the track, and the evidence tended to show

*See first foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; first foot-note of *Stewart v. Omaha, etc., R. Co.* (Neb.), 39 R. R. R. 298, 62 Am. & Eng. R. Cas., N. S., 298; first foot-note of *Thompson v. Albuquerque Traction Co.* (N. Mex.), 38 R. R. R. 656, 61 Am. & Eng. R. Cas., N. S., 656; first head-note of *Horsman v. Brockton, etc., Ry. Co.* (Mass.), 37 R. R. R. 62, 60 Am. & Eng. R. Cas., N. S., 62.

†See last foot-note of *Sparr v. United, etc., Elect. Co.* (Md.), 40 R. R. R. 430, 63 Am. & Eng. R. Cas., N. S., 430; fifth head-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; first head-note of *United Rys., etc., Co. v. Kolken* (Md.), 39 R. R. R. 52, 62 Am. & Eng. R. Cas., N. S., 52; first head-note of *Blue Grass Traction Co. v. Ingles* (Ky.), 38 R. R. R. 205, 61 Am. & Eng. R. Cas., N. S., 205.

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that the motorman, when 50 feet away, ought to have seen the plaintiff when he was 5 feet from the track, it was open to the jury to find either that the motorman did not make proper effort to prevent the collision, or that the inability to stop the car was due to its excessive and unlawful rate of speed, and the question of the negligence of the defendant company was, therefore, properly submitted to the jury.

Street Railroads—Operation—Personal Injuries—Contributory Negligence.‡—A pedestrian upon a crosswalk, where he might reasonably assume that the motorman of a street railway car would expect pedestrians to cross and would have the car under proper control accordingly, had a right to expect that the motorman would respect his right to cross the street if he was in position to justify such crossing, under a reasonable belief that he could safely do so if both he and the motorman exercised reasonable care.

Street Railroads—Operation—Contributory Negligence—Question for Jury.—Where, from the testimony, the jury could legitimately find that when the plaintiff, after looking when five feet away from the defendant's trolley track laid in a public highway, started to cross the track, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a "pretty fair rate of speed" and sufficiently distant to be checked, or, if need be, stopped, before it reached him, the question of the plaintiff's contributory negligence was for the jury.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Fred Kraut against the Public Service Railway Company. From a judgment of the Supreme Court (79 N. J. Law, 408, 75 Atl. 165), reversing a judgment for plaintiff, he brings error. Judgment of Supreme Court reversed, and judgment of the district court affirmed.

Ralph E. Lum (*Lum, Tamblyn & Colyer*, on the brief), for plaintiff in error.

Leonard J. Tynan and *Duane E. Minard*, for defendant in error.

TRENCHARD, J. This action was brought in the Second district court of the city of Newark. The jury found a verdict for the plaintiff. On appeal to the Supreme Court the judgment entered upon the verdict was reversed. 79 N. J. Law, 408, 75 Atl. 165. This writ of error brings up for review such judgment of the Supreme Court. The suit was brought to recover damages

‡See last foot-note of *Strauchon v. Metropolitan St. Ry. Co.* (Mo.), 40 R. R. R. 669, 63 Am. & Eng. R. Cas., N. S., 669; foot-note of *Blake v. Rhode Island*, 39 R. R. R. 792, 62 Am. & Eng. R. Cas., N. S., 792; foot-note of *Arkansas, etc., R. Co. v. Graves* (Ark.), 39 R. R. R. 259, 242, 62 Am. & Eng. R. Cas., N. S., 242.

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resulting to the plaintiff below by reason of his having been struck by a trolley car of the defendant company while he was crossing Broad street in the city of Newark. At the trial, the only testimony as to the happening of the accident was that of the plaintiff himself. On his direct examination he testified that he was crossing Broad street at a crosswalk near the corner of Broad and Market streets; that when he was 5 or 6 feet distant from the north-bound track he looked and saw a car 45 or 50 feet away coming at a "pretty fair rate of speed" towards him on that track; that he proceeded to cross, and, as he was stepping over the last rail, his foot was struck by the car and he was injured. On cross-examination, at one point he testified that he was just starting from the sidewalk, and at another, that he was about "5, 10, or 11 feet" from the sidewalk, when he saw the car 45 or 50 feet away. While it thus appears that his testimony upon direct examination and cross-examination is not in entire harmony, due probably to his imperfect understanding of the English language, yet it was clearly open to the jury to infer that the facts of the case were exhibited by his direct examination. We are unable to agree with the Supreme Court that a verdict should have been directed for the defendant upon the ground of the contributory negligence of the plaintiff. On the contrary, we are of opinion that the case was properly submitted to the jury.

[1] The general principle governing the relation of the street railway to the traveling public is that their respective rights in the public highway must be exercised by each of them, with due regard to the rights of the other, in a reasonable and duly careful manner. *Glasco v. Jersey City H. & P. St. Ry. Co.*, 79 Atl. 368; *Migans v. Jersey City H. & P. St. Ry. Co.*, 76 N. J. Law, 535, 70 Atl. 168.

[2] It was the duty of the motorman, when approaching the crosswalk, to have his car so far under control that he would not endanger the safety of pedestrians engaged in the lawful and customary use of such crosswalk. *Consolidated Traction Co. v. Glynn*, 59 N. J. Law, 432, 37 Atl. 66; *Searles v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 388, 57 Atl. 134.

[3] Whether, in the present case, there was negligence in the operation of the car which collided with the plaintiff using the crosswalk depends largely upon the speed of the car and the distance which the car had to go at the time the motorman saw, or ought to have seen, the plaintiff in the act of crossing the track. *Zolpher v. Camden Sub. Ry. Co.*, 69 N. J. Law, 417, 55 Atl. 249. From the testimony of the plaintiff, the jury was justified in concluding that the motorman, when 50 feet way, ought to have seen the plaintiff within 5 feet of the track, crossing upon the crosswalk. It was undisputed that the motorman was then driving the car at a "pretty fair rate of speed." It traveled 50 feet while the plaintiff was traveling about 10 feet. It was, therefore, open

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to the jury to find either that the motorman did not make proper effort to prevent the collision, or that the inability to stop the car was due to its excessive and unlawful rate of speed. The question of the negligence of the defendant was, therefore, properly submitted to the jury. We are also of the opinion it could not be said as a matter of law that the plaintiff was guilty of contributory negligence.

[4] The plaintiff was upon a crosswalk, where he might reasonably assume that the motorman would expect pedestrians to cross, and would have the car under proper control accordingly; and the plaintiff had a right to expect that the motorman would respect his right to cross the street if he was in position to justify such crossing under a reasonable belief that he could safely do so if both he and the motorman exercised reasonable care. *Bauer v. North Jersey St. Ry. Co.*, 74 N. J. Law, 624, 65 Atl. 1037.

[5] From the testimony the jury could legitimately find that when the plaintiff, after looking when 5 feet from the track, started to cross, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a "pretty fair rate of speed" and sufficiently distant to be checked, or, if need be, stopped before it should reach him. The question of the plaintiff's contributory negligence was, therefore, properly submitted to the jury in the district court. *Migans v. Jersey City, H. & P. Ry. Co.*, 76 N. J. Law, 535, 70 Atl. 168; *Bauer v. North Jersey St. Ry. Co.*, 74 N. J. Law, 624, 65 Atl. 1037.

The judgment of the Supreme Court will be reversed, and the judgment of the district court affirmed.

SUBLETT *v.* MOBILE & O. RY. CO.

(Court of Appeals of Kentucky, Dec. 6, 1911.)

[141 S. W. Rep. 50.]

Railroads—Crossing Accident—Liability—Failure to Give Signal—Proximate Cause.*—Though a train fails to give a crossing signal, yet, this not having been the proximate cause of an accident, but a team, running away without a driver, having run into the side of the train after the locomotive had passed the crossing, the company is not liable.

Appeal from Circuit Court, Hickman County.

Action by H. R. Sublett against the Mobile & Ohio Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Smith, Hindman & Myatt, for appellant.

Lansden & Lansden and *E. T. Bullock*, for appellee.

MILLER, J. The appellant, Sublett, brought this action against the appellee railroad company for \$357.25 damages, for injuries to his team of horses and wagon, which he alleged were caused by the appellee's freight train running into his team on October 18, 1910, at about 8 o'clock p. m., at a point where the Clinton and Moscow public road crosses the appellee's railroad track, about one mile north of Moscow. There was no eyewitness of the accident. Shortly before the accident, the appellant had left his team, hitched to his wagon, and unattended, on a street in Moscow. The horses started down the road toward Clinton in a run; appellant running after them, and only a short distance behind them. The horses circled through the streets of the town, and went north by way of the bridge over Bayou de Chien creek, the Twin bridges, and then up the road toward Clinton. The horses constantly extended their lead of appellant, until they reached the railroad crossing about a mile north of town, when the appellant was about 350 yards behind his team. At this point the railroad track runs in a northwardly and southwardly direction, while the public road runs in a northeasterly direction, and crosses the railroad track by an approach, covered with cinders, which arises to an elevation of some seven or eight feet. Shortly before appellant reached the crossing, appellee's freight train passed southwardly toward Moscow. Appellant says the train

*See last paragraph of first foot-note of *Illinois Cent. R. Co. v. Moss* (Ky.), 40 R. R. R. 41, 63 Am. & Eng. R. Cas., N. S., 41; first foot-note of *Arkansas, etc., R. Co. v. Graves* (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259.

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whistled for Moscow after it had passed the crossing, while appellee's trainmen insist that the whistle was sounded for the crossing, and while the train was north of and before it reached the crossing. When appellant reached the crossing, he found his wagon about 12 feet west of the railroad track and north of the crossing, the front part of it turned northwardly; one horse standing back near the side of the railroad track, and the other horse attached to the wagon. The tongue of the wagon was broken into three pieces, and both horses were badly injured about the head, neck, and shoulders. One of them died within a few days, and the other was badly crippled. At the conclusion of the plaintiff's evidence, appellee moved the court to peremptorily instruct the jury to find for the defendant, but the court overruled the motion at the time; but, at the end of all the testimony, and upon a renewal of the motion, the circuit judge sustained it, and peremptorily directed the jury to find for the defendant, which was done, and, from a verdict and judgment conforming to that ruling, the plaintiff prosecutes this appeal.

As there was a conflict in the evidence as to whether the engineer of the train sounded the whistle before he reached the crossing, it is contended by appellant that the case should have gone to the jury; while, on the other hand, the appellee insists that, although it be conceded, for the purposes of the trial, that the signal for the crossing was not given, this was nevertheless a case where the horses ran away and into the train; that there was no connection whatever between the failure to whistle and the injury to the team; and that before there can be a recovery it must be made to appear that the injuries to the team were the proximate result of the failure to whistle for the crossing. When we consider that Moscow was about a mile further down the track, it is hardly probable the whistle heard by Sublett was intended for the Moscow stop, as he contends; it is far more probable that it was intended for the crossing.

Conceding, however, that there was conflicting testimony as to whether the whistle was sounded before the train reached the crossing, which would ordinarily be sufficient to send the case to the jury, it is nevertheless clearly apparent from the evidence that the horses ran into the train, and that the failure to signal the crossing, if there was such a failure, was not the proximate cause of the injuries. The trainmen of the company insist that they had no accident of any kind at the time and place above indicated, and never heard of the accident complained of until afterwards. All the witnesses concur in stating that the wounds and injuries to the horses were about their heads, necks, and shoulders, and that the tongue was the only portion of the wagon that was injured. Moreover, the location of the horses and team after the accident shows that they were not struck while they were on, or crossing the track, but that the team was in-

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jured on the west or approaching side of the railroad track, and before it had gotten upon the track. If the team had been upon the track, and had been struck by the engine, the blow, in all probability, would have carried it to the south side of the crossing, and upon either side of the railroad track; but all the witnesses agree that the horses and wagon were upon the north side of the crossing, and the west side of the track. Such a condition could not have been the result if the team had been struck, while crossing the track, by a heavy freight train, moving at the rate of from 20 to 25 miles an hour. Several of the witnesses attempted to find marks or evidence of some kind between the rails that might indicate that the horses had gotten that far; but in his they wholly failed. The evidence shows that the accident occurred upon the west side of the track, and before the horses had gotten upon the track. Evidently, while running away, they ran into the freight cars of the train after the engine had passed the crossing. Under these facts, we think the circuit judge properly withdrew the case from the jury.

The general rule in cases of this class is that, although those in charge of the train could not have prevented the accident, or saved the horses after they were discovered, the company is nevertheless liable, if they failed to give the signals, such as the statute requires, on the approach of a train to a public crossing. *M. & O. R. R. Co. v. Roper*, 58 S. W. 518, 22 Ky. Law Rep. 666. But this general rule must, of necessity, be restricted in its application to those cases wherein the injury is the proximate result of such negligence. If it plainly appears that the injury resulted from causes or acts, other than the negligence of the company's servants, and wholly irrespective thereof, there is no ground for putting a liability upon the company.

This rule was applied in *L. & N. R. R. Co. v. Onan's Adm'r*, 110 S. W. 380, 33 Ky. Law Rep. 462, where this court said that if the proximate cause of the accident was the backing of Onan's horse upon the track, and not a failure of the engineer to give notice of the approach of the train, there was no liability upon the part of the defendant.

And, in *Hummer's Ex'x v. L. & N. R. R. Co.*, 128 Ky. 486, 494, 108 S. W. 885, 888, 32 Ky. Law Rep. 1315, 1318, it was said: "It is incumbent on railroad trains to give proper warning of their approach, and, although deaf persons may not hear them, other persons may, and thus save them from danger. But, under the facts in this case, the instruction was not prejudicial. In order for the plaintiff to recover, he must not only show that there was negligence on the part of the defendant, but also that the injury occurred as the proximate result of such negligence; for he cannot complain of negligence on the part of the defendant which in no way affected the injury complained of."

In the case at bar, it is plain that, although the appellee may

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have failed to give the signal for the crossing, the injury was not the proximate result of that failure; it in no way affected the bringing about of the injuries complained of.

Appellant relies chiefly upon the authority of *L. & N. R. R. Co. v. Montgomery*, 32 S. W. 738, 17 Ky. Law Rep. 807, decided in 1895. But that case is easily distinguishable in principle from the case at bar. The facts and circumstances attending the accident in that case, such as the retreat of the horse down the track in its attempt to escape, not only showed negligence on the part of the company, but also that the killing was the proximate result of said negligence. A like state of facts appears in *L. & N. R. R. Co. v. Moore*, 84 S. W. 1144, 27 Ky. Law Rep. 293. Such, however, is not the case here. Under the facts of this case, we are of opinion that the ruling of the circuit judge in peremptorily directing a verdict for the defendant was right. *Weingartner v. L. & N. R. R. Co.*, 42 S. W. 839, 19 Ky. Law Rep. 1023.

Judgment affirmed.

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(Supreme Court of Rhode Island, Feb. 7, 1912.)

[82 Atl. Rep. 81.]

Street Railroads — Operation—Injuries — Last Clear Chance.*—

Where a driver with an unobstructed view attempted to pass in front of a car which had the right of way, the motorman was not,

*For the authorities in this series on the subject of the right of those in charge of trains or street cars to assume that persons seen on or near tracks will avoid being struck by trains or cars, see first foot-note of *Morton v. Southern Ry. Co.* (Va.), 41 R. R. R. 758, 64 Am. & Eng. R. Cas., N. S., 758; second foot-note of *Plinkiewisch v. Portland Ry., etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; first paragraph of first foot-note of *Adams v. Arkansas, etc., R. Co.* (La.), 39 R. R. R. 254, 62 Am. & Eng. R. Cas., N. S., 254.

For the authorities in this series on the subject of the last chance doctrine, see last foot-note of *Morton v. Southern Ry. Co.* (Va.), 41 R. R. R. 758, 64 Am. & Eng. R. Cas., N. S., 758; last foot-note of *Kruck v. Connecticut Co.* (Conn.), 41 R. R. R. 462, 64 Am. & Eng. R. Cas., N. S., 462; first foot-note of *Hammers v. Colorado, etc., R. Co.* (La.), 41 R. R. R. 414, 64 Am. & Eng. R. Cas., N. S., 414; third foot-note of *Stewart v. Portland Ry., etc., Co.* (Ore.), 40 R. R. R. 794, 63 Am. & Eng. R. Cas., N. S., 794; fourth head-note of *Plinkiewisch v. Portland Ry., etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; last paragraph of fourth foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; last foot-note of *Wilson v. Illinois Cent. R. Co.* (Iowa), 39 R. R. R. 282, 62 Am. & Eng. R. Cas., N. S., 282; last head-note of *Adams v. Arkansas, etc., R. Co.* (La.), 39 R. R. R. 254, 62 Am. & Eng. R. Cas., N. S., 254.

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under the last clear chance doctrine, required to stop his car the moment he saw the driver; for he could assume that the driver would not put himself in a place of danger, and until he saw that the driver was in a place of danger he was under no duty to attempt to avoid it.

Appeal and Error—Review—Verdict—Approval by Trial Court.—The verdict of the jury receives no added force by the approval of the trial court, made upon an erroneous view of the law applicable to the facts of the case.

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Frank Winn against the Union Railroad Company. There was a verdict for plaintiff, and defendant excepts to the denial of his motion for new trial. Exceptions sustained, and case remanded.

J. C. Quinn, for plaintiff.

Joseph C. Sweeney and *Alonzo R. Williams*, for defendant.

PER CURIAM. [1] Just previous to the accident the defendant's car was proceeding downgrade on Wickenden street, approaching Brook street, at moderate speed, as appears from the testimony. The justice of the superior court in his rescript finds that the testimony of the motorman on the car as to the location of the car when the plaintiff drove out of Brook street onto Wickenden street is entitled to greater weight than that of any other witness. The justice accepts as true the motorman's statement that the car was 100 feet up Wickenden, east of its intersection with Brook, when he saw the plaintiff's horses emerging from Brook street. The plaintiff, as the event demonstrates, did not have the right of way, and should have stopped and waited until the car passed. The justice finds that the plaintiff was guilty of negligence in attempting to cross the track as he did, but approves the verdict of the jury on the ground that it was warranted under the rule of the last clear chance. He bases his conclusion as to the duty of the motorman upon the facts stated by that witness and quoted in the rescript of the justice. According to that testimony the car was 100 feet away from Brook street when the horses of the coal wagon first appeared in the motorman's sight, coming out of Brook street. The motorman then held the car under control, rang the bell, and applied the brakes. When the car had proceeded 50 feet nearer Brook street he attempted to bring the car to a standstill as quickly as it could be done at that time. The justice holds that, under the doctrine of the last clear chance, it was the motorman's duty, when he first saw the horses coming out of Brook street, to make the same effort to stop the car that he made a few seconds later, and that if he had done so he would have averted the accident. We cannot

agree with this interpretation of the rule of the last clear chance and its application to the facts of this case. The plaintiff was sitting on top of a high coal wagon, with an unobstructed view of the surroundings, and with the car in plain sight. The motorman had the right to assume that the plaintiff would have a care for his own safety, and as he did not have the right of way would not negligently drive upon the track. The doctrine of the last clear chance would not require the motorman to attempt to stop the car, and thus save the plaintiff from the results of his own negligence, until he had reason to think that the plaintiff was about to put himself in a place of danger. In the circumstances of the case, as testified to by the motorman and taken as true by the justice, the motorman was not under the legal duty to stop his car as soon as he saw the plaintiff coming out of Brook street.

[2] As the justice approves the verdict upon what appears to us to be an erroneous view of the law applicable to the facts of the case, the jury's finding receives no added force by reason of that approval. After an examination of the testimony in the case, the verdict does not appear to us to do justice between the parties, and we are of the opinion that there should be another trial of the case. The defendant's exception to the decision of the justice on the motion for a new trial is sustained.

We find no merit in the other exceptions of the defendant. The case is remitted to the superior court for a new trial.

MALLET v. SEATTLE, R. & S. Ry. Co.

(Supreme Court of Washington, Dec. 16, 1911.)

[119 Pac. Rep. 743.]

Appeal and Error—Review—Judgment of Nonsuit.—In determining whether the trial court erred in denying a motion for nonsuit, the appellate court may only consider plaintiff's evidence.

Street Railroads—Injuries—Contributory Negligence.*—If one using a street car track knew, or in the exercise of ordinary care should have known, that a car was approaching in front or behind, he was bound to avoid the danger.

Street Railroads—Injuries—Contributory Negligence—Care Required.†—One walking on a street car track in a city was not required to use the same degree of care as if upon a private way, or upon a steam railroad, not being a trespasser.

Street Railroads—Injuries—Jury Question—Contributory Negligence.—Plaintiff, when injured, was walking north on the westerly track of a street car company; it being the custom of pedestrians to use the tracks in going north from a certain street. The day was bright and the way dry. He had walked some 40 or 60 feet between the rails, or between the tracks, when he saw a car coming from the north, and crossed to the easterly track, and after the car passed looked back, but saw no car coming upon that track, which was used only by north-bound cars. Plaintiff continued to walk north on the easterly track, and after he had gone about 30 or 40 feet he heard a shout and a bell, and was run over by a north-bound car before he could get off the track. The tracks were level and straight, so that a car could be seen to the south from the street near where plaintiff started about 900 feet, and north at least 300 feet. Held, that whether plaintiff should have seen the car in time to have gotten off the track was for the jury.

Street Railroads—Injuries—Negligence—Warning.‡—A motorman is required, in the exercise of ordinary care, to give a timely alarm to warn a pedestrian on the track of the approach of the car.

*See first paragraph of second foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767.

†See foot-note of *Pantages v. Seattle Elect. Co.* (Wash.), 41 R. R. R. 418, 64 Am. & Eng. R. Cas., N. S., 418; first paragraph of first foot-note of *Thompson v. Albuquerque Traction Co.* (N. Mex.), 38 R. R. R. 656, 61 Am. & Eng. R. Cas., N. S., 656.

‡For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see second paragraph of second foot-note of *Acton v. Fargo, etc., Ry. Co.* (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767; *Tecker v. Seattle, etc., Ry. Co.* (Wash.), 38 R. R. R. 229, 61 Am. & Eng. R. Cas., N. S., 229; first foot-note of *Blue Grass Traction Co. v. Ingles* (Ky.), 38 R. R. R. 205, 61 Am. & Eng. R. Cas., N. S., 205; foot-note of *Illinois Cent. R. Co. v. Flaherty* (Ky.), 37 R. R. R. 404, 60 Am. & Eng. R. Cas., N. S., 404.

Mallett v. Seattle, R. & S. Ry. Co

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Richard Mallett against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Will H. Thompson and *Morris B. Sachs*, for appellant.

Heber McHugh and *John T. Casey*, for respondent.

MOUNT, J. Action for personal injuries. The plaintiff was struck by one of defendant's cars, running upon the easterly track of a double-track electric line on Rainier avenue, in the southerly part of Seattle. His left leg was broken, and he received other injuries. The case was tried to a jury. At the close of the plaintiff's evidence, a motion for a nonsuit was made and denied. At the close of all the evidence, the case was submitted to a jury, and a verdict was rendered for the plaintiff. The motion for new trial was made and denied, and judgment followed. This appeal is prosecuted by the defendant from that judgment.

Two assignments of error are made: (1) That the court erred in denying defendant's motion for a nonsuit; (2) that the court erred in overruling defendant's motion for a new trial.

[1] In considering the first assignment, we must take the evidence offered in behalf of the plaintiff as the facts in the case. It appears therefrom that the defendant maintains a double-track electric street railway upon Rainier avenue from south of Court street north. This avenue extends in a northerly and southerly direction. On the east side, the avenue was paved or covered with planking 16 feet in width, for street travel. There were no sidewalks for pedestrians upon either side of the avenue. This planking abutted up to the lower part of the ties of the easterly track of the street railway. The two tracks of the railway were some 12 inches, or possibly more, higher than the planking. Between the two tracks, the ground was uneven. On the easterly side of the tracks, the street was not improved or used. It was the custom of pedestrians living south of Court street to use the tracks for travel to the north. On the afternoon of August 4, 1909, the plaintiff intended to go from Court street to the post office, about a block north. He entered upon the westerly track of the railway. The day was clear and bright, and the way was dry. He traveled some 40 or 60 feet, either between the rails of the westerly track, or between the two tracks, when he saw a car coming toward him from the north. He thereupon crossed over to the easterly track. After this car passed, he looked back toward the south, but saw no car upon the easterly track. At that point the cars going south occupied the westerly track, and those going north occupied the easterly track. The tracks were level and straight, so that one could see a car from Court street south

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about 900 feet, and north 300 feet, possibly more. After plaintiff crossed over onto the easterly track, he proceeded to walk north on the track. When he had gone a short distance, probably 30 or 40 feet, he heard a shout and a bell, and turning to the right saw a north-bound car so close upon him that he did not have time to escape from the track. The car struck him, and threw him to the planked part of the street. He was rendered unconscious. The car was stopped, so that the rear platform of the car was opposite where he lay. There was evidence that the car which struck the plaintiff was running very fast. One witness put the speed at 30 miles per hour. This estimate, we think, was much exaggerated.

[2] Counsel for appellant argue that the street car track was of itself a danger signal, and that the plaintiff in using the same as a footpath was obliged to use his senses and keep out of the way of approaching cars. It is no doubt true that the plaintiff was obliged to use his senses, and if he knew, or in the exercise of ordinary care should have known, that a car was coming down upon him, either in front or from behind, it was his duty to avoid danger.

[3] The defendant was not a trespasser. He was rightfully in the street and upon the track. And, while he was required to use his senses and take notice of the fact that cars were in use upon the street railway tracks, he was not required to use the same degree of care as a man upon a private way, or upon a steam railway. *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 67 Pac. 601. In that case we said: “* * * It is a well-established rule of law that a pedestrian is not charged with the negligence of street car operators, but that he is justified in basing his calculations and ordering his movements on the assumption that the car will be operated, not only in conformity with local laws regulating it, but with the highest degree of care and a due regard for the safety of the traveling public, who are equally with it entitled to use of the streets.” And in *Skinner v. Tacoma Railway & Power Co.*, 46 Wash. 122, 89 Pac. 488, we said: “If the motorman sees a clear track, and has no occasion to stop, and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing.”

[4, 5] We think this rule applies in this case. The plaintiff, according to his testimony, was walking upon the street car track. He got out of the way of a car coming toward him in front. After that car passed by him, he looked down the track behind him, and saw no car coming. The car which a little later struck him was no doubt somewhere near the car which had just passed him. The question whether he should have seen this car

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depends, of course, upon the distance it was away, and was, we think, a question for the jury. But certainly, if the plaintiff was walking upon the track with his back to the on-coming car, he was in plain view of the motorman who must have seen him. No doubt the motorman had a right to suppose that the plaintiff would clear the way for the car before the car reached him; but it was the duty of the motorman to give some alarm, so as to call the attention of a man of ordinary senses upon the track to the fact that the car was approaching him. In other words, the motorman would not be justified in running down a pedestrian without some warning in time for the pedestrian to escape. Appellant relies upon *Fluhart v. Seattle Electric Co.*, 118 Pac. 51, *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, *Coats v. Seattle Electric Co.*, 39 Wash. 386, 81 Pac. 830, and other cases of that character. These were all crossing cases, where the injured parties placed themselves immediately in front of cars which were known, or should have been known, to be approaching. These cases are entirely different from this, because here, if the plaintiff's story is true, he was run down without warning given in time for escape, and without knowledge of the approach of the car. We think the questions of negligence of the defendant and of the plaintiff were for the jury.

Appellant argues upon the second assignment of error that the whole evidence shows that the plaintiff is not entitled to recover, and therefore the court should have granted a new trial. The evidence on behalf of the defendant tends to show that the plaintiff was returning from the post office, instead of going there; that he was traveling south, instead of north; that he was walking upon the planked part of the street to the east of the east railway track, facing the on-coming car, in a place of perfect safety; that, just before the car reached him, he turned to his right and attempted to step with his left foot upon the track almost immediately in front of the car; that the bell was sounded, and the motorman and a passenger upon the car called loudly to him. The motor was reversed, but plaintiff, being so close to the car, was struck and injured when there was no opportunity to stop the car. There is ample evidence and circumstances in the record to show that the injury occurred in that way. If it did so occur, the defendant was not liable under the cases cited by appellant and noticed above. This is a case where the jury must discredit the whole of the evidence on one side or the other, in so far as it relates to the manner of the injury. If the truth is as related by witnesses for the defendant, plaintiff was clearly not entitled to recover. The question was one for the jury, and the jury having found for the plaintiff, and, the trial court having refused to exercise his discretion and grant a new trial, as he might have done, we feel that we are not justified in doing so.

The judgment is therefore affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

MISSOURI, K. & T. RY. CO. *v.* HORTON.

(Supreme Court of Oklahoma, May 9, 1911.)

[119 Pac. Rep. 233.]

Continuance—Surprise—Diligence.—Surprise at the trial is not sufficient ground for a continuance, unless the surprise is such as cannot be obviated by the exercise of ordinary care and due diligence on the part of the party asking for the continuance.

Trial—Instructions—Construction as a Whole.—If an instruction complained of, when considered in connection with the other instructions given, fairly covers the legal phases necessary to present to the jury, the cause will not be reversed, although, standing alone, it may not be technically accurate.

Damages—Measure—Loss of Services.*—In an action by a parent for the loss of the services of his minor child, the damage to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amounts necessarily expended in the treatment and care of the child, and the value of the parent's services while nursing the child; and the jury may consider that with age, growth, and experience the value of the child's services would increase, although they cannot consider that the child might, if not injured, engage in any particular calling.

Railroads—Public Crossings—Care Required of Railroad and Traveler.†—The obligations, rights, and duties of the railroads and travelers at public crossings are mutual and reciprocal, and no greater

*See last paragraph of foot-note of *Hendrickson v. Louisville, etc., Ry. Co.* (Ky.), 35 R. R. R. 774, 58 Am. & Eng. R. Cas., N. S., 774.

†For the authorities in this series on the subject of the duty to keep a lookout on a train approaching a crossing, see second foot-note of *Chesapeake, etc., Ry. Co. v. Bank* (Ky.), 41 R. R. R. 667, 64 Am. & Eng. R. Cas., N. S., 667; first foot-note of *Louisville & N. R. Co. v. Calvert* (Ala.), 40 R. R. R. 8, 63 Am. & Eng. R. Cas., N. S., 8; fourth head-note of *Arkansas, etc., Ry. Co. v. Graves* (Ark.), 39 R. R. R. 259, 62 Am. & Eng. R. Cas., N. S., 259.

For the authorities in this series on the subject of the care required of a highway traveler to discover an approaching train before attempting to cross railroad tracks, see first foot-note of *Beech v. Missouri, etc., Ry. Co.* (Kan.), 41 R. R. R. 652, 64 Am. & Eng. R. Cas., N. S., 652; second foot-note of *Philadelphia, etc., R. Co. v. Buchanan* (Del.), 40 R. R. R. 23, 63 Am. & Eng. R. Cas., N. S., 23; *Mississippi Cent. R. Co. v. Hanna* (Miss.), 40 R. R. R. 14, 63 Am. & Eng. R. Cas., N. S., 14; first head-note of *Bates v. San Pedro, etc., R. Co.* (Utah), 40 R. R. R. 413, 63 Am. & Eng. R. Cas., N. S., 413; first foot-note of *Heinz v. Baltimore & O. R. Co.* (Md.), 38 R. R. R. 172, 61 Am. & Eng. R. Cas., N. S., 172; first head-note of *Brommer v. Pennsylvania R. Co.* (C. C. A.), 38 R. R. R. 51, 61 Am. & Eng. R. Cas., N. S., 51.

For the authorities in this series on the subject of the right of way as between a steam railroad train and a highway traveler, and the mutual rights and duties of each, at a crossing, see *Cox v. Illi-*

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degree of care is required of one than of the other. Both parties are charged with a mutual degree of care in keeping a lookout on their part, and the degree of diligence to be exercised on both sides is such as a prudent man would exercise under the circumstances of the case.

Evidence—Burden of Proof—General Rule.—An instruction to the effect that the burden of proof is upon the plaintiff to establish each and every particular fact necessary to make out his cause of action by a preponderance of the evidence, and the burden is upon the defendant to establish the affirmative allegations or defense set up in its answer by a preponderance of the evidence, was a correct general statement of the law governing the burden of proof, and therefore unobjectionable.

(Syllabus by the Court.)

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by R. L. Horton against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Clifford L. Jackson and *W. R. Allen*, for plaintiff in error.

J. E. Whitehead and *Wallace Wilkinson*, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, to recover damages from the plaintiff in

nois Cent. R. Co. (Ky.), 40 R. R. R. 48, 63 Am. & Eng. R. Cas., N. S., 48; seventh head-note of Philadelphia, etc., R. Co. v. Buchanan (Del.), 40 R. R. R. 23, 63 Am. & Eng. R. Cas., N. S., 23; Weatherly v. Nashville, etc., Ry. (Ala.), 35 R. R. R. 759, 58 Am. & Eng. R. Cas., N. S., 759 (railroad has right of way at street crossings; and right of each to rely upon the exercise of due care by the other); Illinois Cent. R. Co. v. Sumrall (Miss.), 35 R. R. R. 585, 58 Am. & Eng. R. Cas., N. S., 585 (reciprocal duties of highway traveler and railroad); Evansville, etc., R. Co. v. Berndt (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535 (railroad is entitled to precedence over crossing upon giving due notice to highway traveler of its purpose to use it); Cincinnati, etc., Ry. Co. v. Champ (Ky.), 27 R. R. R. 265, 50 Am. & Eng. R. Cas., N. S., 265 (mutual duties); Williams v. Chicago, etc., Ry. Co. (Neb.), 25 R. R. R. 343, 48 Am. & Eng. R. Cas., N. S., 343 (mutual rights and duties when train is standing at crossing); Duffy v. Atlantic, etc., Co. (N. Car.), 26 R. R. R. 102, 49 Am. & Eng. R. Cas., N. S., 102 (mutual rights and duties); Webster v. Chicago, etc., Ry. Co. (C. C. A.), 30 R. R. R. 460, 53 Am. & Eng. R. Cas., N. S., 460 (mutual rights of railroad and public with respect to use of highway crossing); Kuntz v. Oregon R. Co. (Ore.), 29 R. R. R. 721, 52 Am. & Eng. R. Cas., N. S., 721 (right of way); Wilson v. Southern Pac. Co. (Utah), 4 Am. & Eng. R. Cas., N. S., 40 (right of way between train and vehicle); Allen v. Boston & M. R. R. (Me.), 19 Am. & Eng. R. Cas., N. S., 729 (right of way between stationary trains and highway travelers).

For the authorities in this series on the subject of the right of way as between street cars and other users of streets, see second footnote of Acton v. Fargo, etc., Ry. Co. (N. Dak.), 39 R. R. R. 767, 62 Am. & Eng. R. Cas., N. S., 767.

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error, defendant below, for loss of services of his minor son, by reason of injuries alleged to have been inflicted upon him by the defendant on the 2d day of March, 1908, under the following circumstances: On said date said minor son was walking upon Krebs avenue, in the city of McAlester, and crossing the tracks of the defendant company upon said street; the defendant, through its agents and employees, negligently and carelessly pushed a box car against plaintiff's said minor son, thereby knocking him down and severely injuring him. The answer was a general denial, except as to the incorporation of the defendant, and a further allegation to the effect that, even if the injuries complained of were sustained, said injuries were not due to the negligence of the defendant, but were due solely to negligence on the part of said minor son. The reply was a general denial. Upon trial to a jury, there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The assignments of error presented by counsel for plaintiff in error in their brief are: (1) That the plaintiff in error having announced ready for trial, and the jury having been impaneled, it was prejudicial error to permit the defendant in error to amend his complaint without granting the plaintiff in error a continuance; (2) it was error to instruct the jury that the injured boy and the trains of the railway company had an equal right to use the street at the point the defendant in error claimed the accident happened; (3) the court in his instructions to the jury incorrectly stated the rule as to the measure of the damages; (4) it was improper under the circumstances of this case to instruct the jury that the burden of proving affirmative defenses rested upon the plaintiff in error.

[1] It seems that originally the petition did not contain an allegation to the effect that said minor son was exercising ordinary care in crossing said crossing, and that said injury was received without fault or negligence on the part of said minor son or of said plaintiff. When the case was called for trial, counsel for defendant objected to the introduction of any evidence, upon the ground that the petition did not state facts sufficient to constitute a cause of action, because the same did not allege that the boy was exercising ordinary care. The court took that view of the law, and permitted the plaintiff to amend his petition by interlineation in the respect complained of, whereupon counsel for defendant moved for a continuance, upon the ground that, "since this petition has been amended, we are not prepared to meet this evidence at this time." We do not believe it was error to overrule this motion. The rule seems to be well settled that: "Surprise at the trial may, and frequently does, operate as a ground for continuance, unless the surprise is such as might have been obviated by the exercise of ordinary care and due dili-

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gence on the part of the party asking the continuance." 9 Cyc. 129, and cases cited.

Granting that the court below was justified in requiring the plaintiff to amend his petition, we do not see how the amendment made could surprise the defendant. The pleadings had never been attacked by demurrer before the case was called for trial, and the answer sets up contributory negligence upon the part of the minor as a defense. Most ordinary prudence would require counsel for defendant to be ready to meet an issue joined by the pleadings before he, announced ready for trial. Section 4346, Wilson's Oklahoma Statutes, 1903, which provides for continuances upon the amendment of pleadings, reads as follows: "When either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial, in consequence thereof, a continuance may be granted to some day in term, or to another term of the court." There was nothing in the nature of amendments made that in any way changed the issues as they were joined by the pleadings, and it cannot be said that the defendant was surprised by the added allegation, when he had already set up contributory negligence as an affirmative defense.

[4] On the second proposition, the rule seems to be settled that the obligations, rights, and duties of the railroads and travelers at public crossings are mutual and reciprocal, and no greater degree of care is required of one than of the other. Both parties are charged with a mutual degree of care in keeping a lookout on their part, and the degree of diligence to be exercised on both sides is such as a prudent man would exercise under the circumstances of the case. *Continental Improvement Company v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *T. & P. R. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132.

[2] When the instruction complained of is considered in connection with other instructions given, we do not believe it would be misleading. It is true that, standing alone, it is not technically accurate; but, in view of the other instructions, we do not believe that it could give the jury the impression, as counsel for plaintiff in error seem to think, that plaintiff might heedlessly go upon the tracks, expecting the train to await his passage. From the character and momentum of the railroad train, and the requirements of public travel by means thereof, it cannot be expected that it would stop and give precedence to an approaching pedestrian to make the crossing first; it is the duty of the traveler to wait for the trains. The train has the preference and right of way. *Continental Improvement Company v. Stead*, *supra*. On that point the court instructed the jury that: "It is the duty of every person, when going upon or across a railroad track at a

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public crossing, to look in each direction to see if cars are approaching, and a failure to do so is want of ordinary care. As a matter of law, both the minor son, Horton, and the defendant, the railway company, had an equal right to cross the street at the point where plaintiff claims the accident happened, and the law imposes on both parties the duty of using reasonable and prudent precaution to avoid accident and danger."

Another instruction, covering the same proposition, is as follows: "You are further instructed that the plaintiff in this case is charged with all the acts of the son, T. B. Horton, and all omissions of him at the time of the injury, and before he can recover he must establish by a preponderance of the evidence that his son was attempting to cross the tracks of the defendant at Krebs avenue, and that before attempting to cross he looked and listened, so as to ascertain whether or not any cars were approaching said crossing from either direction, and that duty was continuous until he had crossed all the tracks, and if the boy was injured by a failure on his part to exercise that degree of care the plaintiff cannot recover."

We think these instructions sufficiently explained to the jury the mutual rights and duties existing between the parties under the circumstances of this case.

[3] On the question of the measure of damages, the court instructed the jury as follows: "The court further instructs the jury that if you should find for the plaintiff that in arriving at the amount he would be entitled to recover you should take into consideration all the circumstances of the case, as shown by the evidence, tending to show the earning capacity of the boy, both before and after the injury, and the possible amount the father would likely have received therefrom, over and above what the son is capable of earning in his present condition; but in arriving at this amount you cannot consider or take into consideration the pain or suffering of the son, nor any loss or disability he may have suffered or sustained because of the injury, as these things, if recovered at all, can only be recovered in a suit by the son."

The record shows that this instruction was requested by the plaintiff in error; but counsel complains that the instruction given should have been supplemented by the following instruction, which was requested and refused: "The court instructs the jury that, if you find for the plaintiff, the amount plaintiff is entitled to recover is such a sum of money as you may find from the evidence would represent the difference between the earnings of the son in his present condition and what his earnings would have been, had he not been crippled, from the time of his injury till he arrived at the age of 21 years, and in arriving at the amount you should consider the cost of maintaining, clothing, and schooling this boy, and deduct such amount from the amount representing the difference before mentioned."

Instead of giving the requested instruction, the court instructed the jury as follows: "The value of the boy's services, without having been injured, are deemed to be such as are ordinary with children in the same condition and station in life, considering his health, intelligence, and his probable loss of time for attendance at school, and such other like matters, and without regard to any peculiar value the plaintiff might attach to his boy's services."

There is no particular difference in the meaning of the instruction given and the one requested, except that the court omitted from the instruction given any reference to the cost of maintaining, clothing, and schooling the boy. There are many cases that hold that the cost of maintaining, clothing, and schooling the child should be deducted, but in these cases the minor is killed outright, and the father is no longer charged with that burden. In *Birmingham R. L. & P. Co. v. Chastain*, 158 Ala. 421, 48 South. 85, where the child survived, the rule as to the measure of damages was stated as follows: "In an action by a parent for the loss of the services of his minor child; the damages to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amounts necessarily expended in the treatment and care of the child, and the value of the parent's services while nursing the child; and the jury may consider that with age, growth, and experience the value of the child's services would increase, although they cannot consider that the child might, if not injured, engage in any particular calling."

The above rule is applicable to the part of the instruction relative to the compensation for loss of services in the case at bar, and, as that was the only item of damage claimed by the plaintiff, we think the instruction on that point was sufficient.

[5] On the last proposition, counsel contend that this was not a case where the issue of contributory negligence was to be proved by the plaintiff in error, but one where the jury should have been left to determine whether or not the defendant in error made out his case by a preponderance of evidence. We find no instruction upon which counsel could base an objection along this line. On the question of the burden of proof, the court instructed the jury as follows: "The burden of proof is upon the plaintiff to establish each and every particular fact necessary to make out his cause of action by a preponderance of the evidence, * * * and the burden is upon the defendant to establish the affirmative allegations or defenses set up in its answer by a preponderance of the evidence." This is a correct general statement of the law, and therefore unobjectionable.

Finding no reversible error in the record, the judgment of the court below must be affirmed. It is so ordered. All the Justices concur.

NEW YORK, C. & ST. L. RY. CO. *v.* ROPER et al.

(Supreme Court of Indiana, Nov. 24, 1911.)

[96 S. E. Rep. 468.]

Railroads—Fires—Negligence—Pleading.—A complaint for the destruction of plaintiff's house by a fire alleged to have been set out by defendant railroad company, charging that sparks from defendant's engine set fire to combustible material which defendant had negligently permitted to remain on its right of way, and that defendant negligently permitted the fire to escape therefrom, pass over plaintiff's land to his dwelling house, etc., sufficiently alleged negligence to repel a demurrer.

Appeal and Error—Cured Error—Verdict.—Where a special verdict found that the fire which destroyed plaintiff's house was caused by sparks from defendant's engine, and that the fire originated on defendant's right of way, any error in refusing instructions that plaintiff could not recover unless the evidence established that defendant set fire to combustible material on its right of way was cured.

Railroads—Fires—Knowledge of Railroad Company.*—Where a fire by which plaintiff's house was burned originated on defendant's railroad right of way by sparks from its locomotive, it was not necessary for plaintiff to show that defendant had knowledge or notice of the existence of the fire, in order to charge defendant with liability.

Trial—Instructions—Request to Charge—Instructions Given.—An instruction that, if a railroad used a reasonable amount of active vigilance in keeping its right of way free from combustible matter, it discharged its duty, that the law did not require it to keep its right of way absolutely free from leaves, grass, or other combustible material, and that the company was only bound to exercise the care of a reasonably prudent man in preventing fires on his own premises, and in preventing fires from igniting on his own premises and escaping to the land of others, and that the railroad company was not bound to guard against that which might not be reasonably anticipated to occur, covered a request to charge that if defendant's right of way, at the place where the fire originated, was reasonably clean and free from combustible material, it was not negligent.

Railroads—Fires—Instructions—Issues.—Where, in an action for damages by fire set out by a railroad locomotive, the complaint charged as a sole allegation of negligence that defendant permitted combustible material to accumulate and remain on the right of way,

*For the authorities in this series on the question whether a railroad's liability for the destruction of property by a fire started by sparks from its locomotive depends upon whether it was negligent, see first foot-note of *Wallace v. New York, etc., R. Co.* (Mass.), 40 R. R. R. 434, 63 Am. & Eng. R. Cas., N. S., 434.

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and permitted fire which ignited such material to escape to plaintiff's land, the court properly refused to charge with reference to the equipment of defendant's engine with spark arresters, and their operation, as not within the issues.

Insurance—Subrogation of Insurers.†—Where an insurance company paid to insured a loss caused by the negligence of defendant railroad company in the burning of insured's property, such payment constituted an equitable assignment of so much of insured's claim against the railroad company, and subrogated the insurer to the rights of the insured to the extent of the insurance paid.

Railroads—Fires—Causation.‡—Evidence given by the wife of the tenant who occupied a house alleged to have been burned by fire started on defendant's right of way that she saw the noon train pass, and "right after it passed" she saw the fire on the right of way, which fire escaped and burned the house, was sufficient to warrant a finding that the fire was caused by sparks from the passing locomotive.

Trial—Instructions—Province of Jury.—An instruction that if plaintiff and defendant, insurance company, used such an amount of active vigilance in protecting the property claimed to have been destroyed by fire set out on defendant's right of way as a reasonably prudent person would use, under the circumstances detailed in the evidence, to protect his own, they were not negligent, was not objectionable as invading the province of the jury by indicating the court's opinion as to the weight of the evidence.

Damages—Interest—Torts.§—Since, in an action against a railroad company for the destruction of a house adjoining its right of way by fire alleged to have been negligently set out, the measure of damages is fixed and definite, to wit, the value of the property destroyed at the time of the fire, the jury may add interest as a part of the damages under the rule that the test is not whether the damages are liquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time in accordance with fixed rules of evidence and known standards of value which the court or jury must follow, rather than be guided only by their best judgment.

†See fifth foot-note of *Ide v. Boston & M. R. R.* (Vt.), 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

‡For the authorities in this series on the question whether the fact that a fire was started from sparks from a locomotive may be established by circumstantial evidence, and the sufficiency of such evidence, see first foot-note of *Lemann Co. v. Texas, etc., Ry. Co.* (La.), 41 R. R. R. 615, 64 Am. & Eng. R. Cas., N. S., 615; last foot-note of *Abbott v. Chicago, etc., R. Co.* (Neb.), 41 R. R. R. 742, 64 Am. & Eng. R. Cas., N. S., 742; last foot-note of *Mellinger v. Pennsylvania R. Co.* (Pa.), 40 R. R. R. 108, 63 Am. & Eng. R. Cas., N. S., 108.

§See sixth foot-note of *Ide v. Boston & M. R. R.* (Vt.), 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

New York, C. & St. L. Ry. Co. v. Roper et al

Appeal from Circuit Court, Porter County; H. B. Tuthill, Judge.

Action by George W. Roper against the New York, Chicago & St. Louis Railway Company, in which the Farmers' Mutual Insurance Company of Lake County intervened as cross-complainant. Judgment for plaintiffs, and defendant appeals. Affirmed.

Transferred from the Appellate Court under Acts 1901, c. 259; Burns' Ann. St. 1908, § 1405.

Walter Olds, for appellant.

C. B. Tinkham, *W. J. McAleer*, and *Joseph H. Conroy*, for appellees.

MORRIS, J. Appellee Roper brought this action against appellant railroad company for damages for the alleged negligent destruction of a house by fire. The house in controversy was insured in the Farmers' Mutual Fire Insurance Company of Lake County for \$800. The insurance company paid Roper this amount, and filed its cross-complaint in this action, to recover the amount paid with interest. The cause was tried by a jury which returned a verdict for appellee Roper for the sum of \$1,700, and the further sum of \$204 for interest, and that appellee insurance company be subrogated to the rights of the plaintiff in the sum of \$800 and the further sum of \$88 as interest thereon. From a judgment on the verdict this appeal is prosecuted by the railroad company. It is contended by appellant that the circuit court erred in overruling a demurrer to the amended complaint because actionable negligence is not alleged therein.

[1] The complaint alleges that plaintiff was the owner of a dwelling house on a tract of land over which the appellant's right of way was located, and which was used by appellant in running locomotives and cars; that appellant had negligently permitted dry grass and combustible material to accumulate and remain on the right of way near plaintiff's real estate and adjacent thereto; that defendant, in operating its locomotives and cars on the right of way near plaintiff's land, did by sparks and fire emitted from its locomotive set fire to the combustible material which it had negligently permitted to remain on its right of way; that defendant negligently permitted the fire so started upon its right of way to escape therefrom, and to pass over plaintiff's real estate to plaintiff's dwelling house and ignite the same, and as a result thereof the house was totally destroyed by burning; that the proximate cause of the burning of the house was the said negligence of defendant in permitting the combustible material to be on the right of way and permitting the fire to escape therefrom; that plaintiff was free from any fault or negligence which contributed to the injury. This is a sufficient allegation of negligence to repel

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a demurrer. *Wabash, etc., R. Co. v. Johnson* (1884) 96 Ind. 40; *Baltimore, etc., R. Co. v. O'Brien* (1906) 38 Ind. App. 143, 77 N. E. 1131; *Pittsburgh, etc., R. Co. v. Wise* (1905) 36 Ind. App. 59, 74 N. E. 1107.

[2] Appellant claims that the circuit court erred in refusing certain instructions the purport of which was to inform the jury that the plaintiff could not recover unless the evidence established the fact that the company set fire to the combustible material on the right of way, and that this error was not cured by any instruction given. On the other hand, appellee Roper insists that, if there was any error in respect to this question, it was harmless. Certain interrogatories were submitted by the court to the jury. The jury finds in its answer to the seventh interrogatory that the fire which destroyed the dwelling was caused by sparks from appellant's engine, and in its answer to the eighteenth interrogatory it finds that the fire originated on appellant's right of way. It thus appears that, if error be conceded, it was harmless because of the affirmative showing of facts by answers to interrogatories. *Ellis v. Hammond* (1901) 157 Ind. 267, 61 N. E. 565; *Nichols v. Central Trust Co.* (1909) 43 Ind. App. 64, 86 N. E. 878.

[3] It is urged that the court erred in refusing to give appellant's requested instruction No. 2. This instruction was drawn on the theory that appellant would not be liable unless it had been proven that appellant had knowledge of the fire on the right of way, and of the spreading of the same, prior to the burning of the building. Where the fire originates on the right of way by sparks from the locomotive, it is not necessary that the employees of the company should have knowledge or notice of its existence. *Pittsburgh, etc., R. Co. v. Indiana Horse Shoe Co.*, 154 Ind. 322, 56 N. E. 766.

[4] Appellant maintains that the court erred in refusing to give a requested instruction informing the jury in substance that, if the jury found that appellant's right of way at the place where the fire originated was reasonably clean and free from combustible material, it would not be guilty of negligence. Instruction No. 12, given by the court, is as follows: "If the railroad company used a reasonable amount of active vigilance in keeping its right of way clean and free from weeds, grass, and leaves, brush, and other combustible matter, then it has discharged its duty, and by this rule is meant that it is not incumbent upon, and the law does not require, a railroad company to keep its right of way absolutely free from leaves, weeds, grass, and other articles that will burn. It does require it to exercise and use reasonable care in efforts to perform this duty, and reasonable care in this behalf is such care as a reasonably prudent man would exercise in preventing fires on his own premises and in preventing fires from igniting on his own premises and escaping thence to the lands

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of others. In other words, neither a railroad company nor an individual is required to guard against that which may not be reasonably anticipated to occur." This instruction was fully as favorable to appellant on this question as was the requested instruction.

[5] Because the lower court failed to instruct the jury, as requested by appellant, on the subject of the measure of its duty with reference to the equipment of its engine with spark arresters, and its operation of the engine, error is assigned. It will be noted that the complaint does not charge any negligence in this matter, and the court properly charged the jury that the only negligence alleged was in permitting combustible material to accumulate and remain on the right of way, and in permitting fire, ignited in the combustible material, to escape therefrom to plaintiff's land and cause the loss in controversy. There was no error in refusing to give the requested instruction.

[6] Appellant has assigned as error the refusal of the trial court to give certain requested instructions relating to the right of the insurance company to be subrogated to the rights of the insured. Counsel assert that, inasmuch as the insurer cannot depend against the amount due on a fire policy because the fire was caused by the negligence of the insured or that of a third party, it ought not to recover from a third party whose negligence caused the fire. Counsel concede the effect of former decisions of this court, but maintain that they are erroneous. It is settled by the decisions of the Court of Appeal of this state that, where an insurance company pays to the insured a loss caused by the negligence of a railway company in burning the property insured, such payment amounts to an equitable assignment of so much of the claim of the one insured against the railroad company, and subrogates the insurance company to the rights of the assured; and, if the loss is greater than the amount of insurance, the insured may recover the excess from the railway. *Phenix Ins. Co. v. Pennsylvania R. Co.* (1893) 134 Ind. 215, 33 N. E. 970. 20 L. R. A. 405; *Lake Erie & Western R. Co. v. Hobbs* (1907) 40 Ind. App. 511, 81 N. E. 90; *Pittsburgh, etc., R. Co. v. German Ins. Co.* (1909) 44 Ind. App. 268, 87 N. E. 995. This court is not inclined to overthrow the doctrine announced in the above decisions.

[7] It is earnestly contended that the evidence is insufficient to sustain the verdict because there is no evidence that the fire was started by appellant. The wife of the tenant who occupied the house that was burned testified that she saw the noon train pass, and "right after it passed" she saw the fire on the right of way. Facts may be established by circumstantial, as well as by direct, evidence. We cannot say that the jury was not warranted in finding that the fire was caused by sparks from the passing locomotive.

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[8] The court of its own motion instructed the jury as follows: "If the plaintiff and defendant, insurance company, used such an amount of active vigilance as a reasonably prudent person would under the circumstances, as detailed in the evidence, to protect his own, they are not guilty of contributory negligence. If, on the contrary, they did not so use such an amount of active vigilance as a reasonably prudent person would use under the circumstances detailed in evidence to protect his own, they are guilty of contributory negligence." It is claimed that the above instruction was erroneous because it invades the province of the jury by stating, in effect, "that, if these parties exercised such amount of active vigilance as detailed in the evidence to protect their own, they are not guilty of contributory negligence." The instruction is not justly chargeable with this construction. The jury would not have been warranted in taking the instruction as an indication of the court's opinion as to the weight of any evidence given, but only as defining the duty of plaintiff and the insurance company, and measuring that duty by the vigilance that a reasonably prudent person would exercise under the circumstances disclosed by the evidence.

[9] The court in an instruction given on its own motion instructed the jury as follows: "If you find from the evidence in this case that the plaintiff is entitled to recover from the defendant railroad company, you will fix the amount of the present value of said house at the time of the fire. Compensatory damages only may be given. The then present value of said house is the amount in cash it was reasonably worth in the market at that time and at that place. Not necessarily what a new house would cost to erect, but, taking into consideration the evidence which has been detailed to you regarding the fair cash value of said house, its condition, age, and situation, what was its fair cash market value at that time. Then, if you find that the plaintiff is entitled to recover, he is entitled to recover such fair cash market value, to which the jury may in their discretion allow interest at the legal rate of 6 per cent. per annum, and out of the sum which plaintiff recovers, provided he does recover, the defendant insurance company is entitled to be allowed the amount which it has paid by reason of its insurance policy thereon, if it recovers at all, to which you may allow interest in your discretion as above stated." The jury found the value of the house at the time of the fire to be \$1,700, and returned a verdict for that amount, together with interest thereon at 6 per cent. The appellant reserved the proper exception to the giving of the instruction, and also filed its motion to modify the judgment by eliminating therefrom the allowance for interest, which motion was overruled and proper exceptions reserved.

It is vigorously maintained by appellant that in an action for the negligent destruction of property the measure of damages is

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the value of the property destroyed at the time of the accident, and interest thereon is not properly allowable, that the allowance of interest is purely a creation of statute, and, as our state provides only for interest in actions arising out of contract, the right to recover interest in actions for tort is necessarily excluded. Counsel for appellant discuss the Indiana decisions on this subject, and condemn some as unsound, and contend for a limitation on the effect of others. The taking of interest was viewed with great disfavor in early times, and was prohibited by the Mosaic law and by the old English laws. It was condemned by the church, and punished by the state with fine and forfeiture, but finally in 1545 was sanctioned in England by Acts 37 Henry VIII, c. 9, 22 Cyc. 1471. At the present time the allowance of interest in matters of contract is regulated by statute in practically all the American states. It may be conceded that the Indiana statute regulating interest deals only with judgments and matters arising out of contract, and, if the allowance of interest in this case depends on the provisions of our statute, appellant's contention must prevail. Burns' Stat. 1908, §§ 7950-7957, inclusive. But in many jurisdictions it is held that, while interest *eo nomine* may not be allowed in the absence of a statutory provision, it may be assessed as damages where the statute is silent. 22 Cyc. 1476. The general rule, supported by the great weight of American authority, is that, in cases of torts to property, interest on the damages may be allowed as a part of the damages, and as an approximately uniform measure of compensation. 22 Cyc. 1502. In Pittsburgh, etc., R. Co. *v.* Swinney (1884) 97 Ind. 586, it was held by this court that in ascertaining the damages for a trespass to lands and removing material therefrom the jury may add to the value of the material taken interest thereon at 6 per cent. The court in its opinion, after reviewing many authorities, uses this language: "What has been said by Sedgwick and other text-writers, as above, on the subject of the assessment of damages in actions of trover and trespass *de bonis asportatis*, applies as well to the case at bar, and has the support of what we regard as the undoubted, if not overwhelming, weight of authority."

The rule adopted in the Swinney Case was followed by the Appellate Court in Chicago, etc., R. Co. *v.* Barnes (1891) 2 Ind. App. 213, 28 N. E. 328, the court saying: "Where, in an action of tort, damages not exemplary are found to be due the plaintiff, the jury trying the cause may, in its discretion, add interest to the sum which it finds to represent the loss." In Wabash, etc., R. Co. *v.* Williamson (1891) 3 Ind. App. 190, 29 N. E. 455, the Appellate Court approved an allowance of interest as a part of the damages for the killing of cattle. In New York, etc., R. Co. *v.* Zumbaugh, 12 Ind. App. 272, 39 N. E. 1058, it was held in a statutory action for damages for killing stock, where the statute expressly limited the amount of recovery to the value of the stock

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killed, that interest is not recoverable. In the case of *Fell v. Union P. R. Co.* (1907) 32 Utah, 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1, the action was for damages in the shipment of live stock. In the course of its opinion the court says: "The allowance of interest in cases of torts to property is in harmony with the trend of modern authority. It is quite true that there are cases against this rule, but they are not, as we conceive, based on either good reason or good logic. * * * Is there any reason why a person sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as this may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money, so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to some one, he certainly would be entitled to interest, and, if he borrowed it from some one, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in statu quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish. Is it an answer to say that the damages are unliquidated, and therefore interest is not to be allowed? This, to our minds, is no reason at all in case of injury to or destruction of property. In all such cases the party sustaining the loss is limited in his recovery to the market or actual value of the property at the time of the injury or destruction. Moreover, he must establish the amount of the loss by some fixed rule or standard, and the evidence must be confined thereto, and either the court or jury must find the value in accordance with the evidence. In the class of cases, therefore, where the damage is complete, and the amount of the loss is fixed as of a particular time, there is—there can be—no reason why interest should be withheld merely because the damages are unliquidated. There are certain cases of unliquidated damages where interest cannot be allowed. In all personal injury cases, cases of death by wrongful act, libel, slander, false imprisonment, malicious prosecution, assault and battery, and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible. But this is so because the damages are continuing and may even reach beyond the time of trial. There are also other cases where interest is not allowed, such as where exemplary damages are permitted, where the statute fixes a penalty or determines the damages to be allowed. * * * General justice is never promoted by an effort to reach it by ignoring sound principles of law in particular cases. Whenever possible, it ought not to be left to the mere caprice of either court or jury to either grant or withhold that which is due.

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A fixed rule, when based on sound principles, is, in most instances, a safer guide than the judgment of a few individuals, however honest or pure their motives. * * * The true test to be applied as to whether interest should be allowed before judgment in a given case or not is therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete, and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury or for elements that cannot be measured by any fixed standards of value." The above case, as reported in 28 L. R. A. (N. S.) 1, is carefully annotated, and the trend of American authority appears to incline to the allowance of interest in cases of torts to property as a convenient and approximately just method of awarding compensation. However, in Missouri, and one or two other states the rule has been rejected. In the following cases of negligent destruction of property by fire interest has been allowed either *eo nomine*, or as damages. *Regan v. New York, etc., R. Co.*, 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; *Burdick v. Chicago, etc., R. Co.*, 87 Iowa, 384, 54 N. W. 439; *Lucas v. Wattles*, 49 Mich. 380, 13 N. W. 782; *Union P. R. Co. v. Ray*, 46 Neb. 750, 65 N. W. 773; *Whitbeck v. New York, etc., R. Co.*, 36 Barb. (N. Y.) 644; *Pacific Ex. Co. v. Lasker*, 81 Tex. 84, 16 S. W. 792; *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 295, 7 Am. Rep. 81; *Eddy v. Lafayette*, 49 Fed. 807, 1 C. C. A. 441; *Albany, etc., R. Co. v. Wheeler*, 6 Ga. App. 270, 64 S. E. 1114; *Louisville, etc., R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429; *Ainsworth v. Lakin*, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314.

All authorities agree that in actions of this character the measure of damages is compensation, and the basis thereof is the value of the property destroyed, and to be fixed as of the date of its destruction. But, however diligent may be the courts and parties, in many cases long delays inevitably result by reason of the illness and death of parties and witnesses, and for many other reasons that are universally conceded to be sound. Either party has a right to appeal to a court of review, and often the cause must be reversed by the court of appeals, in which case the judgment of the court below is vacated. In the case at bar the destruction of the property occurred in May, 1906. If this judgment were reversed, and the cause remanded for a new trial, and at such trial the recovery should be limited to the value of the property destroyed, the plaintiff could not be fully compensated, yet, except when the amount of recovery is so limited by statute, the law declares the rule of full compensation. Surely the law ought not to hold out to a tort-feasor a premium on delay. It may be said that

in cases of this kind, pending the rebuilding of the destroyed structure at least, the more logical rule of measurement would be the value of the use of the property of which the owner is deprived. Practically, however, the rule would be difficult of application, because frequently there would be no standard by which witnesses could determine the value of the use, and the estimates of witnesses would be mere speculations with the inevitable result of great abuse. Besides, the more complicated the issues submitted to the jury, the greater is the danger of error; and, moreover, trials of issues of fact should not be prolonged unless some substantial need therefor exists. The end sought is the same as in many causes arising out of the breach of contracts—compensation. Why may not the courts adopt the same rules by which the same end is reached? It seems to us that fixing the compensation at the value of the destroyed property at the time of its destruction, and, in addition thereto, the legal rate of interest from the time of the destruction to the day of trial more nearly approximates justice than any rule that has been recognized, and has, besides, the merit of certainty and simplicity.

Nor do we believe that in cases of this character, where the value can be ascertained by fixed rules, the allowance of interest on the ascertained value of the property should be discretionary with the jury. The law dispenses no favors, and jurors should mete out equal and exact justice, and should not have the right to allow or refuse interest as one of the elements of just compensation, but in fixing the amount of damages in cases of this character they should be instructed to find the value of the destroyed property as it was on the date of the destruction, and to that amount add interest thereon at the rate of 6 per cent. per annum. *Fell v. Union P. R. Co.*, supra; *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817. While the jury in the case at bar was instructed to allow interest in their discretion, the record shows that they did allow interest, and appellant's rights were not thereby violated. Of course, it does not follow that the above rule would apply to personal injury cases, cases of death by wrongful act, libel, false imprisonment, and cases where there is no standard of market or other value by which to measure the damages; nor could it have application to cases where punitive damages may be assessed, nor to those where the amount of recovery is fixed by statute, but does apply to actions ex delicto for the destruction of or injury to property. The rule declared here is subject to the provisions of our statutes in regard to tender, and in regard to offers to confess judgment before trial. Burns' Stat. 1908, §§ 598, 538. It may be suggested that the allowance of interest as a part of the damages should be limited to the date of the demand, and that to allow interest before that time is to make the rule of compensation broader than is given by statute in case of accounts. The sug-

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gestion is not without merit, but usually the wrongdoer knows of the destruction of or injury to property before the owner does, and in jurisdictions where interest is allowed it is uniformly given from the time of the injury or destruction, and in our opinion this rule is preferable. 22 Cyc. 1546, and cases cited. There is no prejudicial error in the record.

Judgment affirmed.

AUSTIN v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey, Nov. 20, 1911.)

[81 Atl. Rep. 739.]

Negligence—Proof—Weight of Evidence.*—Where the evidence is circumstantial, plaintiff must show the existence of circumstances rendering the inference of negligence by defendant at least probable, and excluding an inference that the damage was due to other causes, though such inference need not be excluded beyond doubt.

Railroads—Fires—Admission of Evidence.*—In an action against a railroad company for damage by fire from a locomotive, evidence as to another fire set by the same locomotive within a few minutes of the time the fire in question was set was admissible.

Error to Circuit Court, Ocean County.

Action by Nathan Austin against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilfred B. Wolcott (*I. W. Carmichael*, on the brief), for defendant in error.

Alan H. Strong, for plaintiff in error.

SWAYZE, J. [1] The facts of this case warranted an inference by the jury that the fire that caused the damages for which the plaintiff sues was caused by sparks from a locomotive engine of defendant. They are quite as strong as in *Goodman v. Lehigh Valley R. R. Co.*, 78 N. J. Law, 317, 74 Atl. 519, a case which after a retrial we this term reaffirm. The defendant appeals to the well-established rule that it is not enough for the plaintiff to prove the possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant, and exclude the in-

*See first foot-note of *Abbott v. Chicago, etc., R. Co.* (Neb.), 41 R. R. R. 742, 64 Am. & Eng. R. Cas., N. S., 742; *Asplund v. Great Northern Ry. Co.* (Wash.), 41 R. R. R. 740, 64 Am. & Eng. R. Cas., N. S., 740; first foot-note of *Mellinger v. Pennsylvania R. Co.* (Pa.), 40 R. R. R. 108, 63 Am. & Eng. R. Cas., N. S., 108.

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ference that the damage was due to a cause for which the defendant was not responsible. That is the rule, and the plaintiff must prove circumstances which render it probable, and not merely possible, that the defendant is at fault. But, when it is said that the circumstances must exclude the inference that the damage was due to a cause for which the defendant is not responsible, it is not meant to change the rule that ordinarily governs in civil cases, and to force the plaintiff to exclude such inference beyond doubt. All that is required is that the circumstances should be so strong that a jury might properly, on grounds of probability, rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial, and where probability may be all that is attainable. A striking illustration is *Suburban Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700.

The evidence as to the condition of the screen also presented a jury question. The screen itself was in evidence, and was produced at the argument before us. An inspection justified an inference adverse to the defendant.

[2] The evidence as to another fire set by the same locomotive within a few minutes of the same time was admissible under the rule in the *Goodman Case*.

The complaint of the comment by the learned trial judge upon the possible interest of one of the witnesses is not warranted. As we read it, the effort of the judge was to show the jury that the charge of bias or interest preferred by the plaintiff was without foundation, and that his relations with the railroad company would not be likely to lead him to color his testimony in the company's favor. It was a well-meant effort in favor of the defendant, and, although it is possible that a different impression may have been conveyed to the jury by the tone or manner of the judge, we are unable to see that it was likely to harm the defendant.

The judgment is affirmed with costs.

STATE ex inf. ATTORNEY GENERAL, *v.* MISSOURI PAC. RY. CO.
et al.

(Supreme Court of Missouri, Nov. 27, 1911.)

[141 S. W. Rep. 643.]

Pleading—Judgment on Pleadings—Answer Taken as True.—Upon a motion for judgment on the pleadings, the answer or return to a writ of quo warranto must be taken as true.

Corporations—Purchase of Stock in Other Corporations.*—Under Const. art. 12, § 7, providing that no corporation shall engage in business other than that expressly authorized by its charter or the law under which it may have been organized, a railroad company may, for the purpose of obtaining fuel for its locomotives, mine coal, and may own and operate an elevator for the handling of the grain which it transports, and hence it may purchase stock in mining and elevator corporations to carry out those purposes, where such ownership is not a mere cloak to hide a usurpation of the corporate franchises of such corporations and such usurpation is not shown by the mere fact that the ownership extends to practically all the stock in such corporations, since it will be presumed that directors have been chosen because of their fitness, and are left to conduct the business in a lawful manner.

Evidence—Judicial Notice.†—The court will take judicial notice that coal is a necessity in the operation of a steam railroad, and that an elevator is of assistance in handling and shipping grain by railroads.

In Banc. Quo warranto by the State, on the information of the Attorney General, against the Missouri Pacific Railway and others. Ouster refused, and defendants discharged.

Herbert S. Hadley, Atty. Gen., *Elliott W. Major*, Atty. Gen., *John Kennish*, Asst. Atty. Gen. (*F. W. Lehmann*, of counsel), for the State.

Martin L. Clardy and *R. T. Railey*, for respondents.

VALLIANT, C. J. The information is in quo warranto. The respondents are Missouri corporations. The business for which each was incorporated is indicated by its corporate name, a rail-

*See first foot-note of *Youngstown, etc., Ry. Co. v. Kessley* (Ohio), 41 R. R. R. 603, 64 Am. & Eng. R. Cas., N. S., 603; foot-note of *Williams v. Johnson* (Mass.), 41 R. R. R. 273, 64 Am. & Eng. R. Cas., N. S., 273; foot-note of *Danville, etc., Ry. Co. v. Lybrook* (Va.), 39 R. R. R. 329, 62 Am. & Eng. R. Cas., N. S., 329.

†See foot-note of *Dingman v. Duluth, etc., Ry. Co.* (Mich.), 40 R. R. R. 186, 63 Am. & Eng. R. Cas., N. S., 186; *Orth v. Saginaw Valley Traction Co.* (Mich.), 37 R. R. R. 588, 60 Am. & Eng. R. Cas., N. S., 588.

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road company, two coal mining companies, and an elevator company.

The charge in the information is that the railroad company has acquired the capital stock of the three other corporations, and is engaged in conducting the business for which they were incorporated. More specifically stated, the charge is that the Western Coal & Mining Company was organized under the laws of this state in 1879, with capital stock of \$500,000, for the purpose of carrying on a general coal and mining business in Missouri, Kansas, and elsewhere, with power to purchase, lease, or otherwise acquire mineral and other lands for the purpose of mining coal and other minerals, buying and selling coal, etc., and owning and operating machinery and appurtenances necessary to carry on that business, and that, after its organization, the corporation entered upon the business for which it was chartered, and continued to conduct the same until the acquisition of its capital stock by the Missouri Pacific Railway Company, whereupon it ceased to perform its functions, and the business has since and is still being conducted alone by the railroad company, to the injury of the interests and welfare of the people of the state. Like specifications are made in relation to the Rich Hill Coal & Mining Company, and, varying only in reference to the character of the business, relating also to the Kansas-Missouri Elevator Company. The conclusion from those facts drawn in the information is that the two coal companies and the elevator company have lost their integrity and individuality, and are rendered incapable of exercising the franchises granted by their respective charters, that each had become a mere cover for the unlawful exercise of power by the railroad company, and their further existence is of injury to the people of the state. The prayer is that the two coal companies and the elevator company be ousted of their charters, that the railroad company be ordered to cease operating the business of those three companies, and, failing to heed such order, that it be ousted of the corporate rights granted by its charter.

The respondents file a joint answer to the following effect: They admit the organization of each of the corporations as stated in the information and the purpose for which it was organized, and they admit that a majority of the capital stock of the three other companies is owned by a trustee who holds the legal title thereto for the use and benefit of the railroad company, but aver that there are four other persons who each own at least one share of the stock. Referring to the averment in the information to the effect that the railroad company holds its charter from the state and has only the powers granted to it as a railroad company by the laws of the state which are only such powers as are necessary, convenient, and incident to the construction, maintenance,

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and operation of a railroad as a public highway, and that, under the Constitution, it can engage in no business other than that expressly authorized by the charter or the law under which it may have been organized, the answer avers that the railroad company has offended in no respect the provisions of the law referred to, and has not gone beyond the lawful power conferred by its charter; that the acquiring of the stock in the coal companies was for the purpose only of securing for its use in operating its railroad the necessary supply of coal for fuel, and the acquiring of the stock in the elevator was to facilitate the shipping and transportation of grain over the railroad. They deny that since the acquisition of the stock by the railroad company the coal companies and the elevator company have ceased to do business under their respective charters, or that such charters, or that such business is or has been conducted by the railroad company; on the contrary, they aver that since the acquisition of the stock, as before, the business of the coal companies and the elevator company have been conducted exclusively by their respective boards of directors duly elected by the stockholders. They deny that there has been any abuse of their charter powers or any conduct on the part of the directors injurious to the interest or welfare of the people of the state, or that the interests or welfare of the people would be promoted by a dissolution of the corporations named or a forfeiture by the railroad company of its beneficial interest in the stock of the other companies.

To that answer the Attorney General filed a reply, in which after denying that any persons other than the trustee for the railroad company owned any of the stock, and denying that the stock was acquired for the purposes stated in the answer, went on to aver that since the acquisition of the stock in the coal companies the railroad company, "through the management, conduct, and control of the said coal companies, engaged in the business of selling coal to the general public, and did sell large amounts through and under the name of said coal and mining companies to the general public in Missouri and elsewhere." An averment of like character was made in reference to the business of the elevator company. These averments differ from those in the information, in this, to wit: In the information it was stated that the railroad company itself was under cover of the charters of these other companies carrying on the business of mining and marketing coal and a general warehouse and elevator business, whereas the averments in the reply are that the railroad company was doing those acts through the management of the coal and elevator companies by virtue of its ownership of the stock in those companies. On motion of the respondents, the court struck out those averments in the reply, construing them to be the pleader's inference from the fact of the ownership of the stock, and, since the ownership of the stock was ad-

mitted in the answer or return, the inference to be drawn was but a legal conclusion.

[1] The state then moved for judgment on the pleadings, and that is the form in which the cause is now submitted for final judgment. For the purposes of this motion the statements in the answer (or return) of respondents must be taken as true, and the statements in the information, admitted by the answer, will also be taken as true. The legal conclusions that either party draws from those facts are open for discussion.

[2] The organizations of the corporations as stated in the information, and the several purposes for which they were, respectively, organized, are admitted, and it is also admitted that the majority of the stock in the coal companies and in the elevator company is held by a trustee for the railroad company. The language of the answer perhaps justifies the inference, also, that all the stock in those companies except four shares in each is held by a trustee for the railroad company, and that those four shares are held by individuals to enable them to qualify as directors as the law requires. Against those admissions, we have the statements in the answer that the purpose of the railroad company in acquiring the stock in the coal companies was to secure to itself a supply of coal to be used as fuel in running its trains, and the purpose in acquiring the stock in the elevator company was to facilitate the handling and shipping of grain to be carried over its road; also, the statements that the railroad company does not operate or control the operation of either of those coal companies or the elevator company, but, on the contrary, each is controlled and operated by its own board of directors and officers appointed by the board, and that each company is performing the duties required by its charter and serving the public impartially as the law requires. Those statements must be taken as true with only this qualification, to wit: The law presumes that the railroad company has exerted its power as a stockholder in electing the directors, and to that extent influences the policy of each company.

Under the state of facts above mentioned, the only question of law in this case is, May a railroad company own the majority of stock in a coal company adjoining or near its line of road or in an elevator company offering a convenient means to aid it in the handling and shipping of grain? The question is not can a railroad company be held to account in a proceeding in quo warranto for an abuse of the power which the ownership of a majority of such stock gives, for perhaps no one would doubt that it would be amenable to such an inquiry, but where there has been no abuse of power, where the business of the corporation is being conducted in the usual way of such business concerns, is it lawful for the railroad company to own the stock? The only written law to which we are referred as sustaining the conten-

tion that it is unlawful for a railroad company to own stock under such conditions is section 7 of article 12 of the Constitution, in which is the following: "No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized." That clause in the Constitution does not refer to the ownership of stock in another company. The thing forbidden is the engaging in business not authorized by its charter. It would doubtless be a violation of that clause of the Constitution if a railroad corporation should acquire and use the stock of another corporation in whose business a railroad company could not lawfully engage as a cover behind which to carry on such business—that is, as a mere means of evading the letter of the law—still in such case the offense would be the carrying on of the business, not the owning of the stock. It would perhaps not be contended that a railroad company could not lawfully own a coal mine and operate it if necessary for the sole purpose of obtaining fuel for its own use, or that it could not own and operate an elevator in the handling of grain to be transported over its railroad. The business therefore of mining coal or operating an elevator is not business of such a character as the clause in the Constitution above quoted forbids. If the railroad company could do that business with its own means, why could it not secure itself in the matter of obtaining coal for fuel or a convenience in handling grain by acquiring stock in a coal or elevator company, if it would be more convenient, and if the public was not injured thereby? The more stock a corporation owns in another concern the more power it has in the election of directors, and through them in influencing the policy of the other corporation, but that is not in fact taking the management of the business in its own hands. We are not overlooking the fact that, where a corporation owns practically all the stock in another concern, it may, if so minded, dictate through the board of directors the method of the business, which would be equivalent to indirectly conducting the business; but that consequence does not necessarily follow. The directors may be chosen with an eye to their ability and honesty, and left to conduct the business according to their best judgment, and the law will presume that such is the case until the contrary is shown. If it should be shown that directors are conducting the business in the interest alone of a stockholder who elected them and to the injury of the other stockholders or to that of the public in general, a case of fraudulent mismanagement would appear, calling for the arm of a court of equity; but such is not this case. We therefore conclude that section 7 of article 12 of the Constitution does not forbid a railroad company to own stock in a coal company or an elevator company, and we hold that the mere fact that the railroad company does own a majority or all but a few shares

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of the stock in those companies does not authorize a judgment of dissolution of the corporations and ouster of their franchises.

It is charged in the information that the charters of the coal companies and the elevator company have become a mere cover for the railroad company under which to hide its unlawful usurpation of the corporate franchises, that those companies by such unlawful usurpation by the railroad company have been rendered incapable of conducting their business, and that their businesses are being conducted by the railroad company. But those statements are denied in the answer of respondents. It is there stated that the business of each of those companies is and has been from the beginning conducted under the direction and control of its own board of directors. Those statements are to be taken as true, and, taking them as true, it leaves the state's case nothing to rest on but the bare fact that the railroad company owns the majority of stock in those other companies.

[3] There is no use for us to go further, and decide whether or not a railroad company may lawfully acquire and hold any or all the capital stock of another corporation whose business has no influence in aiding it in operating its railroad, because there is no such question before us. The court will take judicial knowledge of the fact that coal for fuel is a necessity in the operation of a steam railroad, and that an elevator, although not an absolute necessity, is an assistance in the handling and shopping of grain, and we hold that a railroad company may acquire stock in coal and elevator companies when the purpose is, as in this case it is, to facilitate the business for which it was chartered.

Our judgment is that the ouster demanded in the information should be denied and the respondents discharged. It is so ordered. All concur, except KENNISH, J., not sitting, having been of counsel.

PHILLIPS *v.* ATLANTIC COAST LINE R. Co. et al.

(Supreme Court of South Carolina, Dec. 19, 1911.)

[73 S. E. Rep. 75.]

Carriers—Carriage of Passengers—Forfeiture of Right—Statutory Provision.—Civ. Code 1902, § 2134, which makes it the duty of a carrier to stop at advertised stations a time sufficient for receiving and letting off passengers, refers merely to passengers beginning or ending passage at such station, and cannot be construed as requiring a carrier to receive as a passenger one who had been expelled for misconduct affording ground for ejection from the train which he is seeking to re-enter.

Carriers—Carriage of Passengers—Rules of Railroad.*—While at common law a carrier must accept passengers who present themselves in a proper manner, and are ready and willing to comply with the reasonable rules of the company, the carrier may enforce a reasonable rule preventing a passenger who has willfully refused to pay his fare and provoked expulsion from re-entering the train from which he was expelled.

Carriers—Carriage of Passengers—Damages for Expulsion—Relation of Passenger.—Where a person ejected from a train at a station for a refusal to pay fare with a warning that he would not be allowed to re-enter sought to re-enter and offered to pay full fare, but was refused by the conductor and forcibly ejected when he attempted to so re-enter, there was no such re-establishment of the relation of passenger as would entitle him to damages for the second ejection.

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

Action by Lucius B. Phillips against the Atlantic Coast Line Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

F. L. Willcox, Mark Reynolds, and L. W. McLemore, for appellants.

Lee & Moise, for respondent.

JONES, C. J. The plaintiff boarded defendant's train at Florence, S. C., as a passenger for Marion, S. C., on February 14,

*For the authorities in this series on the subject of the validity of a carrier of passenger's rules and regulations, see foot-note of *Doherty v. Northern Pac. Ry. Co.* (Mont.), 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210; foot-note of *Martin v. Rhode Island Co.* (R. I.), 39 R. R. R. 415, 62 Am. & Eng. R. Cas., N. S., 415; first foot-note of *Kyle v. Chicago, etc., Ry. Co.* (C. C. A.), 39 R. R. R. 149, 62 Am. & Eng. R. Cas., N. S., 149.

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1910, and was ejected at Mars Bluff, a regular station, for non-payment of fare. Before putting plaintiff off, the conductor informed him that, if he was ejected, he would not be allowed to re-enter the train. As soon as plaintiff stepped on the ground, he offered to pay full cash fare from Florence to Marion, but was informed by the conductor that he could not get on the train, and when plaintiff got upon the first steps of the platform to re-enter the train, he was forcibly prevented. This action was brought to recover actual and punitive damages for the second ejection or exclusion. The contention of the plaintiff, sustained by the circuit court in the charge, was that a passenger lawfully ejected for willful refusal to pay fare has the right to re-enter the same train as passenger upon tender of the full cash fare from the beginning of the trip, if the ejection was at a regular station. The judgment was for plaintiff for \$850.

The point has not been ruled in this state, although the writer in his concurring opinion in *Weber v. Railway Co.*, 65 S. C. 378, 43 S. E. 888, expressed the view that one who had been rightfully expelled from a train for nonpayment of fare could not again enter the same train and acquire right to passage by tendering the fare, if his refusal to pay in the first instance was fractious or willful. The great weight of authority supports that view. *Hoffbauer v. Delhi, etc., Ry.*, 52 Iowa, 342, 3 N. W. 121, 35 Am. Rep. 278; *Louisville, etc., Ry. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 672; *Texas & Pac. Ry. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532; *Pickens v. Richmond, etc., R. R.*, 104 N. C. 312, 10 S. E. 562; *Pease v. Delaware, etc., R. R. Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699; *Georgia Southern, etc., R. R. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, and note; *Missouri, etc., R. R. Co. v. Smith*, 152 Fed. 608, 81 C. C. A. 598, 10 Am. & Eng. Ann. Cas. 939, and note.

We cannot think that this sound and salutary rule has no application to lawful ejection at a station where the train is accustomed to stop, and is limited to ejection between stations. The practical effect of such a limitation would be to abrogate the rule, or to cause ejections to be generally made between stations. This last would entail greater loss and inconvenience both upon the carrier and the ejected passenger, as well as delaying the other passengers. The mere wear and tear of stopping and starting a train would often exceed the fare demanded. The place for landing between stations would generally be more unsafe than at stations, because of the absence of provisions for safe landing usually made at stations. The passenger ejected between stations might often be left in darkness, without shelter, and without means to reach a station. Frequent stoppings between stations would seriously interfere with the train's schedule. Would it not be safe and wise to permit and encourage the carrier, when exercising its right of ejection, to do so at a station, so as to sub-

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ject all parties concerned to the least inconvenience and injury without thereby impairing the right. The case of *O'Brien v. Boston, etc., R. R. Co.*, 15 Gray (Mass.) 20, 77 Am. Dec. 347, was a case of lawful ejection between stations, but the primary reasons given for denying the passenger's right to re-enter the car upon tender of the fare after an expulsion for nonpayment were as follows: "Nor could he regain his right to ask of the defendants to perform their contract by his offer to pay the fare after his ejection. They were not bound to accept a performance after a breach. The right to demand the complete execution of the contract by the defendant was defeated by the refusal of the plaintiff to do that which was either a condition precedent, or a concurrent consideration on his part, and the nonperformance of which absolved the defendants of all obligations to fulfill the contract. After being rightfully expelled from the train, he could not again enter the same cars and require the defendants to perform the same contract which he had previously broken. The right to refuse to transport the plaintiff farther, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party who had hitherto refused to perform the contract by paying his fare when duly demanded could immediately re-enter the cars and claim the fulfillment of the original contract by the defendants." It is conceded by practically all the courts that make a distinction between expulsion at stations and between stations that the tender must be for the fare from point where the passenger first boarded the train, not from the station where re-entry is sought, which shows an unwillingness to recognize that a new relation is created by tender of fare for the same train and trip at the station of expulsion. Such belated tender of fare as a performance of the original contract cannot fully restore the status, for the passenger has willfully subjected the carrier to the trouble and risks involved in a forcible ejection, and is usually smarting under humiliation and irritation because of the expulsion, and there is reason for apprehending that he might again refuse to pay and resist ejection when returned to the place and witnesses of his humiliation. Conductors usually busy with other duties at stations ought not to be subjected to the duty of accepting fares before the passenger is admitted to the train, and he can have no assurance that trouble would not again occur when the fare was demanded in the ordinary way of the recalcitrant passenger who had just previously fractiously refused to pay.

[1] We do not regard section 2134, Civ. Code, as applicable to the discussion as that merely to the duty of the carrier to stop at the advertised stations a time sufficient for receiving and letting off passengers, referring to passengers beginning or ending passage at such station. It cannot be construed as requiring the carrier to receive as a passenger one who had been expelled for

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conduct amounting to a forfeiture of his right to a continuation of his trip on that particular train.

[2] While the common law makes it the duty of the carrier to accept passengers at its stations for that purpose who present themselves in a proper manner and are ready and willing to comply with the reasonable rules of the company, it does not deny to the carrier the right to enforce such a reasonable rule as one which prevents a passenger who has willfully refused to pay his fare and provoked expulsion from re-entering the same train. *Pease v. Railroad*, supra, was a case of expulsion at a station, where fare was tendered on the platform near the car door, which point the passenger had reached in the process of expulsion.

[3] It was held that the tender could not have the effect of making a further expulsion unlawful, and that the fact the expulsion occurred at a station was immaterial. The court inter alia used this language: "In such a case as this we think a passenger who resists the lawful requirement of the company to the extent of provoking a breach of the peace and the exhibition of violence in the presence of other passengers cannot as a matter of law demand a passage upon the train where such an exhibition has been made." Referring to the case of *O'Brien v. Railway*, 80 N. Y. 236, the court stated that it held "that, if the stoppage of a train is rendered necessary to expel a passenger therefrom for a fractious refusal to pay fare, he does not by offering to pay it before expulsion become entitled to continue the trip." And, further referring to the *O'Brien Case*, the court said that it decides nothing further than that after arrival at a station and while there, and before force has been applied to effect expulsion, tender of fare would render expulsion unlawful. It is thus made clear that in these cases the fact that the train was at a station was only material in determining when the process of expulsion began. Since the train must stop at a regular station in any event, it cannot be said that the stopping was the beginning of process to expel the passenger, whereas between stations the stopping of the train, if for the purpose of expulsion, is a process in the expulsion. We cannot conceive that an expelled passenger at a station may enter into a new relation by purchasing a ticket entitling him to board the train at that point on the theory that the carrier has made a new contract. Even in that event, the authorities, with an exception or two, appear to hold that the passenger must pay the fare from the initial point of the trip. *Swan v. Manchester, etc., R. R.*, 132 Mass. 116, 42 Am. Rep. 432. It may be also that, if the expelled passenger with the knowledge and acquiescence of the conductor had re-entered the car with intention to comply with the reasonable rules of the company, there would be evidence of a restoration of the original relation, which would prevent another expulsion, if timely tender of fare was made.

The case before us presents no such circumstances. The plain-

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tiff, although warned beforehand that he would not be allowed to return to the train if ejected, immediately after ejection endeavored to re-enter the train, notwithstanding the ejection and interposition of the train officials. There should be a new trial.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, July 27, 1911.)

[189 Fed. Rep. 723.]

Carriers—Action for Injury to Passenger—Questions for Jury.*—

Evidence considered, in an action by a passenger to recover from a railroad company for an injury received by falling when leaving a car in the night, alleged to have been due to an accumulation of snow and ice on the platform and steps, and held sufficient to require the submission to the jury of the questions whether there was such accumulation, and also whether, if so, it was due to the negligence of the company.

Carriers—Injury to Passenger—Contributory Negligence.—That a passenger, injured by falling on the icy steps of a car from which he was alighting in the night, was carrying a grip in each hand, belonging to ladies in his charge, instead of holding to the railing with one hand, cannot be said to constitute contributory negligence as matter of law.

Negligence—Definition.—Negligence consists in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

In error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Charles W. Thompson against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Hallam, for plaintiff in error.

F. W. Root and Nelson J. Wilcox, for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and WM. H. MUNGER, District Judge.

*For the authorities in this series on the duty of a railroad company, as a carrier of passengers, to keep its car steps and platforms free of snow and ice, see last foot-note or *Caywood v. Seattle Elec. Co.* (Wash.), 37 R. R. R. 796, 60 Am. & Eng. R. Cas., N. S., 796.

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WM. H. MUNGER, District Judge. Plaintiff was a passenger on one of the defendant's trains, which left Minneapolis at 6:05 on the evening of February 15, 1910. He rode upon the train to Farmington, where it was necessary for him to leave the train and await a later train from St. Paul through Farmington to Mapleton, plaintiff's destination. He arrived at Farmington some time between 7 and 8 o'clock in the evening on the train which left Minneapolis. The train from St. Paul, though due to leave St. Paul at 6:20, did not arrive at Farmington until about midnight. He boarded this train at Farmington, and upon reaching Mapleton, in attempting to leave the car, slipped and fell, and alleges that he received certain injuries from such fall. The cause of the fall is alleged to be the slippery condition of the platform and steps of the car, upon which snow and ice had accumulated. Upon the trial, at the close of all the evidence, the court directed a verdict for the defendant, basing the ruling upon the fact that, from the undisputed evidence, plaintiff was guilty of contributory negligence. Plaintiff brings the case here by writ of error.

The correctness of the ruling of the court, directing a verdict for the defendant, depends upon the consideration of two questions: (1) Under the evidence, could it properly be said, as a matter of law, that defendant was not guilty of negligence? (2) Under the facts, was plaintiff, as a matter of law, guilty of contributory negligence?

[1] The alleged negligence upon the part of the defendant was permitting the platform and steps of the car to be in a slippery condition by reason of the accumulation of snow and ice, thus rendering it dangerous for passengers in leaving the car. The testimony discloses that, during the afternoon of the 15th of February, before the train left Minneapolis for Farmington, it snowed, turning into sleet, but had ceased storming and was growing very cold, at the time the train left Minneapolis. It does not appear to have been storming at Farmington, while plaintiff was there awaiting the train from St. Paul which he was to take for Mapleton. The testimony of plaintiff and several witnesses was that there was, at the time of the arrival of the train at Mapleton, an accumulation of snow and ice upon the platform and steps of the car; that he slipped and fell while attempting to descend the steps in leaving the car. The testimony of the conductor of the train, as a witness on behalf of defendant, was that the platform and steps were free from snow and ice. The car in which plaintiff rode was a vestibule car, and the end at which the passengers left the car was coupled to an ordinary smoking car, which was not vestibuled. The conductor, however, testified that the vestibule was always kept closed while the train was in motion, and that snow could not very well drift into the vestibule from the open end of the smoker.

It was for the jury to determine, from the conflicting evidence,

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tiff, although warned beforehand that he would not be allowed to return to the train if ejected, immediately after ejection endeavored to re-enter the train, notwithstanding the ejection and interposition of the train officials. There should be a new trial.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO.

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Wm. H. Hallam, for plaintiff in error.

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Before SANBORN and SMITH, Circuit Judges, and WM. H. MUNGER, District Judge.

*For the authorities in this series on the duty of a railroad company, as a carrier of passengers, to keep its car steps and platforms free of snow and ice, see last foot-note or *Caywood v. Seattle Elec. Co.* (Wash.), 37 R. R. R. 796, 60 Am. & Eng. R. Cas., N. S., 796.

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as a matter of law, that an ordinarily prudent person would do as plaintiff did—attempt to leave the hand, instead of making two trips over the steps.

vidence such that the question of negligence on defendant, and contributory negligence upon the plaintiff, should have been submitted to the jury, and that error in directing a verdict for the defendant. Judgment is reversed, with directions to grant a new trial.

KANSAS CITY SOUTHERN RY. CO. v. WORTHINGTON.

(Supreme Court of Arkansas, Nov. 20, 1911.)

[141 S. W. Rep. 1173.]

Carriers—Carriage of Passengers—Duty to Stop Trains at Stations.*—A carrier of passengers must stop its trains at stations it has designated as places for stopping, and there remain for a sufficient time to permit passengers by ordinary diligence to alight in safety.

Carriers—Carriage of Passengers—Obligation of Carrier.†—A carrier carrying passengers on passenger or mixed trains, without making any distinction between them, either by its rules or custom, must stop either class of trains at the usual stopping place long enough to permit its passengers to alight in safety; and a passenger on a mixed train, in the absence of any distinction between passenger and mixed trains, may act on the belief that the carrier will stop its train at a usual stopping place to permit him to alight.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Where a freight train carrying passengers slackened its speed and approached slowly the platform at a station where it was required to stop to permit a passenger to alight, the passenger could act on the belief that the train would stop; and whether he acted with ordinary prudence when he left the caboose and pro-

*See foot-note of Central Kentucky Traction Co. v. Combs (Ky.), 41 R. R. R. 485, 64 Am. & Eng. R. Cas., N. S., 485; first foot-note of Lexington Ry. Co. v. Lowe (Ky.), 40 R. R. R. 718, 63 Am. & Eng. R. Cas., N. S., 718.

†See second paragraph of foot-note of Atlantic City R. Co. v. Clegg (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; first head-note of McMahon v. New Orleans, etc., Co. (La.), 39 R. R. R. 351, 62 Am. & Eng. R. Cas., N. S., 351; first foot-note of Indiana Union Traction Co. v. Keiter (Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; third head-note of Moore v. Aurora, etc., R. Co. (Ill.), 38 R. R. R. 383, 61 Am. & Eng. R. Cas., N. S., 383; last foot-note of Levan v. Atlantic C. L. R. Co. (S. Car.), 38 R. R. R. 36, 61 Am. & Eng. R. Cas., N. S., 36.

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ceeded to the steps thereof preparatory to alighting was for the jury.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Whether a passenger, injured while alighting from a slowly moving freight train on discovering that the train would not stop at his station, was guilty of contributory negligence held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Proximate Cause.‡—Where a freight train carrying passengers slowed down as if to stop at a station where it was required to stop to permit a passenger to alight, and the passenger left the caboose and proceeded to the steps preparatory to alighting, and on discovering that the train would not stop attempted to alight, and was injured, if, as matter of law, he in acting as he did was not guilty of contributory negligence, the failure to stop the train at the station was the proximate cause of the injury; the act of the passenger in alighting being only an incidental cause contributing to the injury induced by the carrier's negligent failure to stop.

Carriers—Injuries to Passengers—Contributory Negligence.‡—A passenger attempting to alight from a train while it is passing a station where it should stop to permit him to alight is not, as a matter of law, guilty of negligence, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds would not arrive at any other conclusion; but otherwise it is a question for the jury, since failure to stop the train at a station does not justify a passenger in attempting to alight under circumstances obviously hazardous.

Kirby, J., dissenting.

Appeal from Circuit Court, Polk County; J. T. Cowling, Judge.

Action by W. A. Worthington against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Read & McDonough, for appellant.

J. I. Alley, for appellee.

FRAUENTHAL, J. This was an action instituted by W. A. Worthington, the plaintiff below, to recover damages for injuries which he alleged he received while attempting to alight as a pas-

‡See foot-note of *Southern Ry. Co. v. Morgan* (Ala.), 41 R. R. R. 168, 64 Am. & Eng. R. Cas., N. S., 168.

For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-note of *Crow v. Southern Ry. Co.* (Ga.), 41 R. R. R. 777, 64 Am. & Eng. R. Cas., N. S., 777; *Plinkiewisch v. Portland, etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; seventh foot-note of *Wells v. Great Northern Ry. Co.* (Ore.), 40 R. R. R. 775, 63 Am. & Eng. R. Cas., N. S., 775.

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senger from one of defendant's trains. On November 25, 1910, the plaintiff became a passenger on one of defendant's local freight trains from Mena to Cove. It appears that Cove was a station on defendant's railroad, and that defendant carried passengers on its local freight trains, and stopped such trains at said station when having passengers for that place. Upon entering the caboose of the train at Mena, the plaintiff notified the conductor that he desired to be carried to Cove, and paid his fare to that station. Before arriving at that station, one of the brakemen went to the engineer and notified him that they had a passenger for Cove, and to stop the train there.

Plaintiff was a resident of Cove, and was well acquainted with the location of the depot platform and the general condition of the track at that place. When the train approached Cove, its speed was slackened until it was going at the rate of probably from three to four miles per hour as it passed the depot platform. In the meanwhile, as the train approached the platform, the plaintiff left his seat and went to the rear of the caboose preparatory to leaving the car. The train did not stop at the depot platform, but was going slowly past it, and the plaintiff, fearing that it would not stop, but would carry him past his destination, attempted to alight from the train, and in doing so was thrown to the ground with such force that he was severely and painfully injured.

The testimony tended to prove that as the train was passing the depot platform it was going at such a slow rate of speed that one might have left it with safety. All of the employees of the defendant upon the train testified to this. One of the brakemen was asked: "Q. The train was going sufficiently slow for a man to get off without injury? A. Yes, sir; I have got off lots of times that slow."

The testimony tended further to prove that just about or after the train had passed the platform the conductor looked for the plaintiff, and, not seeing him, and observing that the train had passed the depot platform so slowly, he thought that he had alighted from the caboose in safety, and thereupon he gave a signal to the engineer not to stop, but to go on, and the train increased its speed, and it did not stop at all. The evidence shows that it was dark when the plaintiff attempted to alight from the train; but it also shows that the plaintiff was well acquainted with the platform and surrounding conditions at that place; that he was active in his movements, and was accustomed to alight from trains.

Upon the trial of the case, a verdict was returned in favor of plaintiff, and the railway company has appealed.

It is contended by counsel for defendant that according to the testimony most favorable to the cause of plaintiff the court should have directed a verdict against his right to recover. It is urged that the defendant under this testimony was not liable for plain-

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tiff's injury, because the failure to stop the train at the station was not the proximate cause thereof, which, it is claimed, was solely the result of his leaving the train while it was in motion. It is also urged that according to the testimony the plaintiff was guilty of contributory negligence in going to the steps of the caboose and attempting to alight therefrom while the train was in motion, or that he thereby voluntarily assumed the risk of any injury resulting therefrom.

[1] It is well settled, we think, that it is the duty of a railroad company as a carrier of passengers to stop its trains at a station which, by its regulations, it has designated as a place for stopping, and to there remain for a sufficient time to permit its passengers, in the exercise of ordinary diligence and care, to safely leave its trains. The passenger must not only be carried properly and safely, but he must be carried to the end of his journey for which he has paid his fare; and he must be put down at the usual stopping place at the end of such journey.

[2] Unless the proof shows that, according to the regulations of the company, or a custom in handling trains, a distinction is made between trains exclusively employed in carrying passengers and those engaged in carrying freight and passengers, it is the duty of a railroad company to transport the passenger on either kind of train to the usual stopping place, and there stop its trains and permit the passenger to alight therefrom. 2 Hutchinson on Carriers (3d Ed.) § 1117.

[3] In the case at bar, there is no evidence that any distinction was made in this regard by any rule, regulation, or custom of defendant between the two kinds of trains. The plaintiff had the right to act upon the belief and assumption that the defendant would stop its train at the usual stopping place at Cove, so that he could there alight. When the train slackened its speed and approached the platform slowly, the plaintiff was therefore warranted in the belief that it was about to and would stop there, and was justified in acting upon that belief. It then became a question for the jury to say whether or not the plaintiff acted with ordinary prudence when he left the caboose and proceeded to the steps thereof preparatory to alighting.

It is contended that the plaintiff was guilty of an act of negligence contributing to his injury by going upon the steps of the caboose while the train was still in motion, and before it had actually stopped; and to sustain this contention we are cited to the cases of *St. L., I. M. & S. R. Co. v. Rush*, 86 Ark. 325, 111 S. W. 263, and *C., R. I. & Pac. R. Co. v. Claunts*, 138 S. W. 332. But we do not think that the principle advanced in those cases is applicable to the facts of this case. In those cases the train had not stopped at the station, and the passenger was not notified or informed that the train would stop at the station. On the contrary, the passenger knew that the train would not stop, and took his

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position upon the steps of the coach without direction from any employee of the carrier, and without any right to believe or assume that the train would stop. In those cases the passenger, while at a place where he had no right to be, and without the knowledge of the carrier's employees of his position, was thrown from the train by the sudden increase in the movement thereof. It was there held that the train operators had a right to assume that the passenger was in his place in the coach, and could move the train as they saw proper, as long as such movement was not calculated to injure passengers who were in such places as would naturally be expected of careful passengers.

[4] In the case at bar, according to the regulations of the defendant, the train should have stopped at this station, and plaintiff had a right to assume, when it slackened its speed and slowly approached the station, that the train would stop at that place. This was the place to which the defendant had agreed to carry him and put him down; and it cannot be said, as a matter of law, under these circumstances, that the plaintiff was negligent in going to the steps of the caboose preparatory to alighting from the train. At the time he attempted to alight, the train was moving slowly; but it was passing the depot platform, and did not stop. Under the circumstances, the jury may well have been warranted in finding that the plaintiff, after he had reached the steps of the caboose, believed, and was justified in believing, that the train was not going to stop at the station, but would carry him past his destination. An emergency was thus presented, and a necessity for sudden action placed upon the plaintiff. This was caused by the negligence of the defendant in failing to stop its train at the station. The plaintiff, by this act of negligence on the part of the defendant, was either required to undergo the inconvenience and annoyance of being carried past his station if he remained upon the train, or to leave the train while still in motion.

[5] If, as a matter of law, he was not guilty of contributory negligence in leaving the moving train under the circumstances of this case, then the injury which he sustained was due to the sole negligence of the defendant in failing to stop its train, which was the proximate cause thereof. The immediate efficient cause of the plaintiff attempting to leave the train was the omission of the defendant to stop its train, and its act in passing the station; this created a situation that necessitated immediate action on plaintiff's part. The act of plaintiff in alighting from the train was only an incidental cause contributing to the injury, which was induced by the defendant's negligent failure to stop its train. If in thus acting the plaintiff was negligent, he would then, and only then, be precluded from a recovery because of his contributory negligence. *L. R. & Ft. S. Ry. Co. v. Atkins*, 46 Ark. 423; 3 Hutchinson on Carriers (3d Ed.) § 1430; 29 Cyc. 500.

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tiff, although warned beforehand that he would not be allowed to return to the train if ejected, immediately after ejection endeavored to re-enter the train, notwithstanding the ejection and interposition of the train officials. There should be a new trial.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO.

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In error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Charles W. Thompson against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

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The judgment is accordingly affirmed.

KIRBY, J., dissents.

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The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, July 27, 1911.)

[189 Fed. Rep. 723.]

Carriers—Action for Injury to Passenger—Questions for Jury.*—

Evidence considered, in an action by a passenger to recover from a railroad company for an injury received by falling when leaving a car in the night, alleged to have been due to an accumulation of snow and ice on the platform and steps, and held sufficient to require the submission to the jury of the questions whether there was such accumulation, and also whether, if so, it was due to the negligence of the company.

Carriers—Injury to Passenger—Contributory Negligence.—That a passenger, injured by falling on the icy steps of a car from which he was alighting in the night, was carrying a grip in each hand, belonging to ladies in his charge, instead of holding to the railing with one hand, cannot be said to constitute contributory negligence as matter of law.

Negligence—Definition.—Negligence consists in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

In error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Charles W. Thompson against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Hallam, for plaintiff in error.

F. W. Root and Nelson J. Wilcox, for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and WM. H. MUNGER, District Judge.

*For the authorities in this series on the duty of a railroad company, as a carrier of passengers, to keep its car steps and platforms free of snow and ice, see last foot-note or *Caywood v. Seattle Elec. Co.* (Wash.), 37 R. R. R. 796, 60 Am. & Eng. R. Cas., N. S., 796.

Thompson v. Chicago, M. & St. P. Ry. Co

WM. H. MUNGER, District Judge. Plaintiff was a passenger on one of the defendant's trains, which left Minneapolis at 6:05 on the evening of February 15, 1910. He rode upon the train to Farmington, where it was necessary for him to leave the train and await a later train from St. Paul through Farmington to Mapleton, plaintiff's destination. He arrived at Farmington some time between 7 and 8 o'clock in the evening on the train which left Minneapolis. The train from St. Paul, though due to leave St. Paul at 6:20, did not arrive at Farmington until about midnight. He boarded this train at Farmington, and upon reaching Mapleton, in attempting to leave the car, slipped and fell, and alleges that he received certain injuries from such fall. The cause of the fall is alleged to be the slippery condition of the platform and steps of the car, upon which snow and ice had accumulated. Upon the trial, at the close of all the evidence, the court directed a verdict for the defendant, basing the ruling upon the fact that, from the undisputed evidence, plaintiff was guilty of contributory negligence. Plaintiff brings the case here by writ of error.

The correctness of the ruling of the court, directing a verdict for the defendant, depends upon the consideration of two questions: (1) Under the evidence, could it properly be said, as a matter of law, that defendant was not guilty of negligence? (2) Under the facts, was plaintiff, as a matter of law, guilty of contributory negligence?

[1] The alleged negligence upon the part of the defendant was permitting the platform and steps of the car to be in a slippery condition by reason of the accumulation of snow and ice, thus rendering it dangerous for passengers in leaving the car. The testimony discloses that, during the afternoon of the 15th of February, before the train left Minneapolis for Farmington, it snowed, turning into sleet, but had ceased storming and was growing very cold, at the time the train left Minneapolis. It does not appear to have been storming at Farmington, while plaintiff was there awaiting the train from St. Paul which he was to take for Mapleton. The testimony of plaintiff and several witnesses was that there was, at the time of the arrival of the train at Mapleton, an accumulation of snow and ice upon the platform and steps of the car; that he slipped and fell while attempting to descend the steps in leaving the car. The testimony of the conductor of the train, as a witness on behalf of defendant, was that the platform and steps were free from snow and ice. The car in which plaintiff rode was a vestibule car, and the end at which the passengers left the car was coupled to an ordinary smoking car, which was not vestibuled. The conductor, however, testified that the vestibule was always kept closed while the train was in motion, and that snow could not very well drift into the vestibule from the open end of the smoker.

It was for the jury to determine, from the conflicting evidence,

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ceeded to the steps thereof preparatory to alighting was for the jury.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Whether a passenger, injured while alighting from a slowly moving freight train on discovering that the train would not stop at his station, was guilty of contributory negligence held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Proximate Cause.‡—Where a freight train carrying passengers slowed down as if to stop at a station where it was required to stop to permit a passenger to alight, and the passenger left the caboose and proceeded to the steps preparatory to alighting, and on discovering that the train would not stop attempted to alight, and was injured, if, as matter of law, he in acting as he did was not guilty of contributory negligence, the failure to stop the train at the station was the proximate cause of the injury; the act of the passenger in alighting being only an incidental cause contributing to the injury induced by the carrier's negligent failure to stop.

Carriers—Injuries to Passengers—Contributory Negligence.‡—A passenger attempting to alight from a train while it is passing a station where it should stop to permit him to alight is not, as a matter of law, guilty of negligence, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds would not arrive at any other conclusion; but otherwise it is a question for the jury, since failure to stop the train at a station does not justify a passenger in attempting to alight under circumstances obviously hazardous.

Kirby, J., dissenting.

Appeal from Circuit Court, Polk County; J. T. Cowling, Judge.

Action by W. A. Worthington against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Read & McDonough, for appellant.

J. I. Alley, for appellee.

FRAUENTHAL, J. This was an action instituted by W. A. Worthington, the plaintiff below, to recover damages for injuries which he alleged he received while attempting to alight as a pas-

‡See foot-note of *Southern Ry. Co. v. Morgan* (Ala.), 41 R. R. R. 168, 64 Am. & Eng. R. Cas., N. S., 168.

For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-note of *Crow v. Southern Ry. Co.* (Ga.), 41 R. R. R. 777, 64 Am. & Eng. R. Cas., N. S., 777; *Plinkiewisch v. Portland, etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; seventh foot-note of *Wells v. Great Northern Ry. Co.* (Ore.), 40 R. R. R. 775, 63 Am. & Eng. R. Cas., N. S., 775.

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It cannot be said, as a matter of law, that an ordinarily prudent person would not do as plaintiff did—attempt to leave the car with a grip in each hand, instead of making two trips over the slippery platform and steps.

We think the evidence such that the question of negligence on the part of the defendant, and contributory negligence upon the part of plaintiff, should have been submitted to the jury, and that the court erred in directing a verdict for the defendant.

The judgment is reversed, with directions to grant a new trial.

KANSAS CITY SOUTHERN RY. CO. *v.* WORTHINGTON.

(Supreme Court of Arkansas, Nov. 20, 1911.)

[141 S. W. Rep. 1173.]

Carriers—Carriage of Passengers—Duty to Stop Trains at Stations.*—A carrier of passengers must stop its trains at stations it has designated as places for stopping, and there remain for a sufficient time to permit passengers by ordinary diligence to alight in safety.

Carriers—Carriage of Passengers—Obligation of Carrier.†—A carrier carrying passengers on passenger or mixed trains, without making any distinction between them, either by its rules or custom, must stop either class of trains at the usual stopping place long enough to permit its passengers to alight in safety; and a passenger on a mixed train, in the absence of any distinction between passenger and mixed trains, may act on the belief that the carrier will stop its train at a usual stopping place to permit him to alight.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Where a freight train carrying passengers slackened its speed and approached slowly the platform at a station where it was required to stop to permit a passenger to alight, the passenger could act on the belief that the train would stop; and whether he acted with ordinary prudence when he left the caboose and pro-

*See foot-note of *Central Kentucky Traction Co. v. Combs* (Ky.), 41 R. R. R. 485, 64 Am. & Eng. R. Cas., N. S., 485; first foot-note of *Lexington Ry. Co. v. Lowe* (Ky.), 40 R. R. R. 718, 63 Am. & Eng. R. Cas., N. S., 718.

†See second paragraph of foot-note of *Atlantic City R. Co. v. Clegg* (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; first head-note of *McMahon v. New Orleans, etc., Co.* (La.), 39 R. R. R. 351, 62 Am. & Eng. R. Cas., N. S., 351; first foot-note of *Indiana Union Traction Co. v. Keiter* (Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; third head-note of *Moore v. Aurora, etc., R. Co.* (Ill.), 38 R. R. R. 383, 61 Am. & Eng. R. Cas., N. S., 383; last foot-note of *Levan v. Atlantic C. L. R. Co.* (S. Car.), 38 R. R. R. 36, 61 Am. & Eng. R. Cas., N. S., 36.

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Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Whether a passenger, injured while alighting from a slowly moving freight train on discovering that the train would not stop at his station, was guilty of contributory negligence held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Proximate Cause.‡—Where a freight train carrying passengers slowed down as if to stop at a station where it was required to stop to permit a passenger to alight, and the passenger left the caboose and proceeded to the steps preparatory to alighting, and on discovering that the train would not stop attempted to alight, and was injured, if, as matter of law, he in acting as he did was not guilty of contributory negligence, the failure to stop the train at the station was the proximate cause of the injury; the act of the passenger in alighting being only an incidental cause contributing to the injury induced by the carrier's negligent failure to stop.

Carriers—Injuries to Passengers—Contributory Negligence.‡—A passenger attempting to alight from a train while it is passing a station where it should stop to permit him to alight is not, as a matter of law, guilty of negligence, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds would not arrive at any other conclusion; but otherwise it is a question for the jury, since failure to stop the train at a station does not justify a passenger in attempting to alight under circumstances obviously hazardous.

Kirby, J., dissenting.

Appeal from Circuit Court, Polk County; J. T. Cowling, Judge.

Action by W. A. Worthington against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Read & McDonough, for appellant.

J. I. Alley, for appellee.

FRAUENTHAL, J. This was an action instituted by W. A. Worthington, the plaintiff below, to recover damages for injuries which he alleged he received while attempting to alight as a pas-

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senger from one of defendant's trains. On November 25, 1910, the plaintiff became a passenger on one of defendant's local freight trains from Mena to Cove. It appears that Cove was a station on defendant's railroad, and that defendant carried passengers on its local freight trains, and stopped such trains at said station when having passengers for that place. Upon entering the caboose of the train at Mena, the plaintiff notified the conductor that he desired to be carried to Cove, and paid his fare to that station. Before arriving at that station, one of the brakemen went to the engineer and notified him that they had a passenger for Cove, and to stop the train there.

Plaintiff was a resident of Cove, and was well acquainted with the location of the depot platform and the general condition of the track at that place. When the train approached Cove, its speed was slackened until it was going at the rate of probably from three to four miles per hour as it passed the depot platform. In the meanwhile, as the train approached the platform, the plaintiff left his seat and went to the rear of the caboose preparatory to leaving the car. The train did not stop at the depot platform, but was going slowly past it, and the plaintiff, fearing that it would not stop, but would carry him past his destination, attempted to alight from the train, and in doing so was thrown to the ground with such force that he was severely and painfully injured.

The testimony tended to prove that as the train was passing the depot platform it was going at such a slow rate of speed that one might have left it with safety. All of the employees of the defendant upon the train testified to this. One of the brakemen was asked: "Q. The train was going sufficiently slow for a man to get off without injury? A. Yes, sir; I have got off lots of times that slow."

The testimony tended further to prove that just about or after the train had passed the platform the conductor looked for the plaintiff, and, not seeing him, and observing that the train had passed the depot platform so slowly, he thought that he had alighted from the caboose in safety, and thereupon he gave a signal to the engineer not to stop, but to go on, and the train increased its speed, and it did not stop at all. The evidence shows that it was dark when the plaintiff attempted to alight from the train; but it also shows that the plaintiff was well acquainted with the platform and surrounding conditions at that place; that he was active in his movements, and was accustomed to alight from trains.

Upon the trial of the case, a verdict was returned in favor of plaintiff, and the railway company has appealed.

It is contended by counsel for defendant that according to the testimony most favorable to the cause of plaintiff the court should have directed a verdict against his right to recover. It is urged that the defendant under this testimony was not liable for plain-

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tiff's injury, because the failure to stop the train at the station was not the proximate cause thereof, which, it is claimed, was solely the result of his leaving the train while it was in motion. It is also urged that according to the testimony the plaintiff was guilty of contributory negligence in going to the steps of the caboose and attempting to alight therefrom while the train was in motion, or that he thereby voluntarily assumed the risk of any injury resulting therefrom.

[1] It is well settled, we think, that it is the duty of a railroad company as a carrier of passengers to stop its trains at a station which, by its regulations, it has designated as a place for stopping, and to there remain for a sufficient time to permit its passengers, in the exercise of ordinary diligence and care, to safely leave its trains. The passenger must not only be carried properly and safely, but he must be carried to the end of his journey for which he has paid his fare; and he must be put down at the usual stopping place at the end of such journey.

[2] Unless the proof shows that, according to the regulations of the company, or a custom in handling trains, a distinction is made between trains exclusively employed in carrying passengers and those engaged in carrying freight and passengers, it is the duty of a railroad company to transport the passenger on either kind of train to the usual stopping place, and there stop its trains and permit the passenger to alight therefrom. 2 Hutchinson on Carriers (3d Ed.) § 1117.

[3] In the case at bar, there is no evidence that any distinction was made in this regard by any rule, regulation, or custom of defendant between the two kinds of trains. The plaintiff had the right to act upon the belief and assumption that the defendant would stop its train at the usual stopping place at Cove, so that he could there alight. When the train slackened its speed and approached the platform slowly, the plaintiff was therefore warranted in the belief that it was about to and would stop there, and was justified in acting upon that belief. It then became a question for the jury to say whether or not the plaintiff acted with ordinary prudence when he left the caboose and proceeded to the steps thereof preparatory to alighting.

It is contended that the plaintiff was guilty of an act of negligence contributing to his injury by going upon the steps of the caboose while the train was still in motion, and before it had actually stopped; and to sustain this contention we are cited to the cases of *St. L., I. M. & S. R. Co. v. Rush*, 86 Ark. 325, 111 S. W. 263, and *C., R. I. & Pac. R. Co. v. Claunts*, 138 S. W. 332. But we do not think that the principle advanced in those cases is applicable to the facts of this case. In those cases the train had not stopped at the station, and the passenger was not notified or informed that the train would stop at the station. On the contrary, the passenger knew that the train would not stop, and took his

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position upon the steps of the coach without direction from any employee of the carrier, and without any right to believe or assume that the train would stop. In those cases the passenger, while at a place where he had no right to be, and without the knowledge of the carrier's employees of his position, was thrown from the train by the sudden increase in the movement thereof. It was there held that the train operators had a right to assume that the passenger was in his place in the coach, and could move the train as they saw proper, as long as such movement was not calculated to injure passengers who were in such places as would naturally be expected of careful passengers.

[4] In the case at bar, according to the regulations of the defendant, the train should have stopped at this station, and plaintiff had a right to assume, when it slackened its speed and slowly approached the station, that the train would stop at that place. This was the place to which the defendant had agreed to carry him and put him down; and it cannot be said, as a matter of law, under these circumstances, that the plaintiff was negligent in going to the steps of the caboose preparatory to alighting from the train. At the time he attempted to alight, the train was moving slowly; but it was passing the depot platform, and did not stop. Under the circumstances, the jury may well have been warranted in finding that the plaintiff, after he had reached the steps of the caboose, believed, and was justified in believing, that the train was not going to stop at the station, but would carry him past his destination. An emergency was thus presented, and a necessity for sudden action placed upon the plaintiff. This was caused by the negligence of the defendant in failing to stop its train at the station. The plaintiff, by this act of negligence on the part of the defendant, was either required to undergo the inconvenience and annoyance of being carried past his station if he remained upon the train, or to leave the train while still in motion.

[5] If, as a matter of law, he was not guilty of contributory negligence in leaving the moving train under the circumstances of this case, then the injury which he sustained was due to the sole negligence of the defendant in failing to stop its train, which was the proximate cause thereof. The immediate efficient cause of the plaintiff attempting to leave the train was the omission of the defendant to stop its train, and its act in passing the station; this created a situation that necessitated immediate action on plaintiff's part. The act of plaintiff in alighting from the train was only an incidental cause contributing to the injury, which was induced by the defendant's negligent failure to stop its train. If in thus acting the plaintiff was negligent, he would then, and only then, be precluded from a recovery because of his contributory negligence. *L. R. & Ft. S. Ry. Co. v. Atkins*, 46 Ark. 423; 3 Hutchinson on Carriers (3d Ed.) § 1430; 29 Cyc. 500.

[6] The question as to whether or not a passenger is guilty, as a matter of law, of contributory negligence, precluding a recovery, for an injury sustained by attempting to alight from a train while moving past the station at which it should stop to enable him to alight has been decided differently by different courts. This court has steadily adhered to the view that the attempt of a passenger to alight from the train while it is passing the place where it should stop to permit him to leave it will not, as a matter of law, be deemed an act of negligence upon his part, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds could fairly arrive at no other conclusion. Otherwise it becomes a question for a jury to determine whether or not such attempt to leave the train while in motion is one of negligence.

In the case of *L. R. & Ft. S. R. Co. v. Atkins*, supra, it was held that it was not negligence per se for a passenger to leave a moving train.

In the case of *St. L., I. M. & S. R. Co. v. Cantrell*, 37 Ark. 526, 40 Am. Rep. 105, this court said: "It may, as a general proposition, be said that it is imprudent or a want of ordinary care to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. It would not be so if the train was moving so slowly that no damage could be reasonably apprehended."

In the case of *Railway Co. v. Tankersley*, 54 Ark. 25, 14 S. W. 1099, the court, speaking through Mr. Justice Hemingway, said: "If it would seem to a person of ordinary prudence and caution to be safe to step off, considering the train's speed, the situation at the place of alighting, the opportunity to see where the step was made, and the activity of the person making it, and all other circumstances reasonably affecting the safety of the attempt, it could not be deemed negligence in the plaintiff to do it." *M. & L. Ry. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *St. L., I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256; *St. L., etc., R. Co. v. Person*, 49 Ark. 184, 4 S. W. 755; *St. L., I. M. & S. R. Co. v. Leamons*, 82 Ark. 504, 102 S. W. 363; *Ark. Cent. Ry. Co. v. Bennett*, 82 Ark. 393, 102 S. W. 198; *St. L., I. M. & S. R. Co. v. Rush*, supra; *C., R. I. & Pac. R. Co. v. Claunts*, supra; 3 Thompson on Negligence, § 3055; 3 Hutchinson on Carriers (3d Ed.) § 1179.

The failure to stop a train at a station will not justify a passenger in attempting to alight under circumstances which are obviously hazardous. But if the necessity of leaving the train while in motion has been put upon the passenger by the negligence of the carrier, by failing to stop its train at the station, then contributory negligence will not be imputed to the passenger from

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the fact of his attempting to alight from the moving train, if, under the circumstances of the case, such act was not a reckless or imprudent one. Under the circumstances of this case, we are of the opinion that it was a question for a jury to determine whether or not the plaintiff was guilty of contributory negligence in attempting to leave the train as he did, while it was in motion.

Counsel for appellant have called to our attention a number of assignments of error, which they claim the court made in its rulings upon the instructions. We have examined each of these assignments, and fail to find that any of them is well founded. The instructions which the court gave are in conformity with the above principles, which we think are applicable to the facts, and the instructions cover correctly every issue that was involved in a fair determination of the merits of this case. We do not think it would serve any useful purpose to note these assignments in detail. By these instructions, the case was fully submitted to the jury upon the issues, first, as to whether or not the defendant was negligent in failing to stop its train at its station at Cove; and, second, as to whether or not plaintiff was guilty of contributory negligence in going to the steps of the coach, and in leaving the train while it was in motion, under the circumstances of this case. Upon these issues the jury returned a verdict in favor of the plaintiff, and we are of the opinion that it is sustained by sufficient evidence.

The judgment is accordingly affirmed.

KIRBY, J., dissents.

Thompson v. Chicago, M. & St. P. Ry. Co

tiff, although warned beforehand that he would not be allowed to return to the train if ejected, immediately after ejection endeavored to re-enter the train, notwithstanding the ejection and interposition of the train officials. There should be a new trial.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded for a new trial.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, July 27, 1911.)

[189 Fed. Rep. 723.]

Carriers—Action for Injury to Passenger—Questions for Jury.*— Evidence considered, in an action by a passenger to recover from a railroad company for an injury received by falling when leaving a car in the night, alleged to have been due to an accumulation of snow and ice on the platform and steps, and held sufficient to require the submission to the jury of the questions whether there was such accumulation, and also whether, if so, it was due to the negligence of the company.

Carriers—Injury to Passenger—Contributory Negligence.—That a passenger, injured by falling on the icy steps of a car from which he was alighting in the night, was carrying a grip in each hand, belonging to ladies in his charge, instead of holding to the railing with one hand, cannot be said to constitute contributory negligence as matter of law.

Negligence—Definition.—Negligence consists in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

In error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Charles W. Thompson against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Hallam, for plaintiff in error.

F. W. Root and *Nelson J. Wilcox*, for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and WM. H. MUNGER, District Judge.

*For the authorities in this series on the duty of a railroad company, as a carrier of passengers, to keep its car steps and platforms free of snow and ice, see last foot-note or *Caywood v. Seattle Elec. Co.* (Wash.), 37 R. R. R. 796, 60 Am. & Eng. R. Cas., N. S., 796.

Thompson v. Chicago, M. & St. P. Ry. Co

WM. H. MUNGER, District Judge. Plaintiff was a passenger on one of the defendant's trains, which left Minneapolis at 6:05 on the evening of February 15, 1910. He rode upon the train to Farmington, where it was necessary for him to leave the train and await a later train from St. Paul through Farmington to Mapleton, plaintiff's destination. He arrived at Farmington some time between 7 and 8 o'clock in the evening on the train which left Minneapolis. The train from St. Paul, though due to leave St. Paul at 6:20, did not arrive at Farmington until about midnight. He boarded this train at Farmington, and upon reaching Mapleton, in attempting to leave the car, slipped and fell, and alleges that he received certain injuries from such fall. The cause of the fall is alleged to be the slippery condition of the platform and steps of the car, upon which snow and ice had accumulated. Upon the trial, at the close of all the evidence, the court directed a verdict for the defendant, basing the ruling upon the fact that, from the undisputed evidence, plaintiff was guilty of contributory negligence. Plaintiff brings the case here by writ of error.

The correctness of the ruling of the court, directing a verdict for the defendant, depends upon the consideration of two questions: (1) Under the evidence, could it properly be said, as a matter of law, that defendant was not guilty of negligence? (2) Under the facts, was plaintiff, as a matter of law, guilty of contributory negligence?

[1] The alleged negligence upon the part of the defendant was permitting the platform and steps of the car to be in a slippery condition by reason of the accumulation of snow and ice, thus rendering it dangerous for passengers in leaving the car. The testimony discloses that, during the afternoon of the 15th of February, before the train left Minneapolis for Farmington, it snowed, turning into sleet, but had ceased storming and was growing very cold, at the time the train left Minneapolis. It does not appear to have been storming at Farmington, while plaintiff was there awaiting the train from St. Paul which he was to take for Mapleton. The testimony of plaintiff and several witnesses was that there was, at the time of the arrival of the train at Mapleton, an accumulation of snow and ice upon the platform and steps of the car; that he slipped and fell while attempting to descend the steps in leaving the car. The testimony of the conductor of the train, as a witness on behalf of defendant, was that the platform and steps were free from snow and ice. The car in which plaintiff rode was a vestibule car, and the end at which the passengers left the car was coupled to an ordinary smoking car, which was not vestibuled. The conductor, however, testified that the vestibule was always kept closed while the train was in motion, and that snow could not very well drift into the vestibule from the open end of the smoker.

It was for the jury to determine, from the conflicting evidence,

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whether there was, upon the platform and steps of the car, an accumulation of snow and ice which rendered it slippery and dangerous to passengers in alighting from the car. From the evidence it appears that Farmington was 26 miles from St. Paul; that the train which plaintiff took from Farmington to Mapleton was due to leave St. Paul at 6:20 in the evening, but did not arrive at Farmington until about midnight. It was a passenger train, consisting of three cars, a baggage car, smoking car, and the vestibule coach upon which plaintiff rode. While it does not appear from the evidence what the schedule running time over the 26 miles between St. Paul and Farmington was, from the well-known operation of passenger trains, we are justified in assuming that it was not from 6:20 in the evening until midnight, but that this train either did not leave St. Paul on time or was delayed for some reason on the way. If there was an accumulation of snow and ice upon the platform and steps of the vestibule coach, as the jury would be justified in finding, and if, as the conductor says, the vestibule doors were always kept closed while the train was moving, and that snow and rain could not well drift in from the open end of the smoking car, then it is apparent that such accumulation of snow and ice upon the platform was the result of the vestibule doors being left open before the train started from St. Paul, or at some point intermediate between St. Paul and Farmington, where the train was delayed. The circumstances in this respect were within the knowledge of the defendant company, and no attempt was made to explain them. We think the evidence was sufficient to submit the question to the jury, not only as to whether or not the platform and steps contained an accumulation of snow and ice, but whether such accumulation of snow and ice upon the platform and steps was due to the negligence of the defendant company.

[2] It appears that the plaintiff on this trip was accompanied by his wife and the wife of his business partner. The train arrived at Mapleton about half past 2 o'clock in the morning. It was a dark night and plaintiff took the two grips belonging to the ladies, one in each hand, and started to leave the car, and just as he was leaving the platform, to descend by way of the steps, he slipped and fell. When the doors of the vestibule car are open, a rod is let down by the side of the door, to keep it open, and this rod also may be used as a handrail by passengers. It is urged that plaintiff was guilty of contributory negligence in attempting to descend from the car with a grip in each hand, knowing the slippery condition of the platform and steps.

[3] Negligence, as defined by the Supreme Court, consists in "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed.

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506. It cannot be said, as a matter of law, that an ordinarily prudent person would not do as plaintiff did—attempt to leave the car with a grip in each hand, instead of making two trips over the slippery platform and steps.

We think the evidence such that the question of negligence on the part of the defendant, and contributory negligence upon the part of plaintiff, should have been submitted to the jury, and that the court erred in directing a verdict for the defendant.

The judgment is reversed, with directions to grant a new trial.

KANSAS CITY SOUTHERN RY. CO. v. WORTHINGTON.

(Supreme Court of Arkansas, Nov. 20, 1911.)

[141 S. W. Rep. 1173.]

Carriers—Carriage of Passengers—Duty to Stop Trains at Stations.*—A carrier of passengers must stop its trains at stations it has designated as places for stopping, and there remain for a sufficient time to permit passengers by ordinary diligence to alight in safety.

Carriers—Carriage of Passengers—Obligation of Carrier.†—A carrier carrying passengers on passenger or mixed trains, without making any distinction between them, either by its rules or custom, must stop either class of trains at the usual stopping place long enough to permit its passengers to alight in safety; and a passenger on a mixed train, in the absence of any distinction between passenger and mixed trains, may act on the belief that the carrier will stop its train at a usual stopping place to permit him to alight.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Where a freight train carrying passengers slackened its speed and approached slowly the platform at a station where it was required to stop to permit a passenger to alight, the passenger could act on the belief that the train would stop; and whether he acted with ordinary prudence when he left the caboose and pro-

*See foot-note of *Central Kentucky Traction Co. v. Combs* (Ky.), 41 R. R. R. 485, 64 Am. & Eng. R. Cas., N. S., 485; first foot-note of *Lexington Ry. Co. v. Lowe* (Ky.), 40 R. R. R. 718, 63 Am. & Eng. R. Cas., N. S., 718.

†See second paragraph of foot-note of *Atlantic City R. Co. v. Clegg* (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; first head-note of *McMahon v. New Orleans, etc., Co.* (La.), 39 R. R. R. 351, 62 Am. & Eng. R. Cas., N. S., 351; first foot-note of *Indiana Union Traction Co. v. Keiter* (Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; third head-note of *Moore v. Aurora, etc., R. Co.* (Ill.), 38 R. R. R. 383, 61 Am. & Eng. R. Cas., N. S., 383; last foot-note of *Levan v. Atlantic C. L. R. Co.* (S. Car.), 38 R. R. R. 36, 61 Am. & Eng. R. Cas., N. S., 36.

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ceeded to the steps thereof preparatory to alighting was for the jury.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.‡—Whether a passenger, injured while alighting from a slowly moving freight train on discovering that the train would not stop at his station, was guilty of contributory negligence held, under the evidence, for the jury.

Carriers—Injuries to Passengers—Proximate Cause.‡—Where a freight train carrying passengers slowed down as if to stop at a station where it was required to stop to permit a passenger to alight, and the passenger left the caboose and proceeded to the steps preparatory to alighting, and on discovering that the train would not stop attempted to alight, and was injured, if, as matter of law, he in acting as he did was not guilty of contributory negligence, the failure to stop the train at the station was the proximate cause of the injury; the act of the passenger in alighting being only an incidental cause contributing to the injury induced by the carrier's negligent failure to stop.

Carriers—Injuries to Passengers—Contributory Negligence.‡—A passenger attempting to alight from a train while it is passing a station where it should stop to permit him to alight is not, as a matter of law, guilty of negligence, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds would not arrive at any other conclusion; but otherwise it is a question for the jury, since failure to stop the train at a station does not justify a passenger in attempting to alight under circumstances obviously hazardous.

Kirby, J., dissenting.

Appeal from Circuit Court, Polk County; J. T. Cowling, Judge.

Action by W. A. Worthington against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Read & McDonough, for appellant.

J. I. Alley, for appellee.

FRAUENTHAL, J. This was an action instituted by W. A. Worthington, the plaintiff below, to recover damages for injuries which he alleged he received while attempting to alight as a pas-

‡See foot-note of *Southern Ry. Co. v. Morgan* (Ala.), 41 R. R. R. 168, 64 Am. & Eng. R. Cas., N. S., 168.

For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-note of *Crow v. Southern Ry. Co.* (Ga.), 41 R. R. R. 777, 64 Am. & Eng. R. Cas., N. S., 777; *Plinkiewisch v. Portland, etc., Co.* (Ore.), 40 R. R. R. 788, 63 Am. & Eng. R. Cas., N. S., 788; seventh foot-note of *Wells v. Great Northern Ry. Co.* (Ore.), 40 R. R. R. 775, 63 Am. & Eng. R. Cas., N. S., 775.

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senger from one of defendant's trains. On November 25, 1910, the plaintiff became a passenger on one of defendant's local freight trains from Mena to Cove. It appears that Cove was a station on defendant's railroad, and that defendant carried passengers on its local freight trains, and stopped such trains at said station when having passengers for that place. Upon entering the caboose of the train at Mena, the plaintiff notified the conductor that he desired to be carried to Cove, and paid his fare to that station. Before arriving at that station, one of the brakemen went to the engineer and notified him that they had a passenger for Cove, and to stop the train there.

Plaintiff was a resident of Cove, and was well acquainted with the location of the depot platform and the general condition of the track at that place. When the train approached Cove, its speed was slackened until it was going at the rate of probably from three to four miles per hour as it passed the depot platform. In the meanwhile, as the train approached the platform, the plaintiff left his seat and went to the rear of the caboose preparatory to leaving the car. The train did not stop at the depot platform, but was going slowly past it, and the plaintiff, fearing that it would not stop, but would carry him past his destination, attempted to alight from the train, and in doing so was thrown to the ground with such force that he was severely and painfully injured.

The testimony tended to prove that as the train was passing the depot platform it was going at such a slow rate of speed that one might have left it with safety. All of the employees of the defendant upon the train testified to this. One of the brakemen was asked: "Q. The train was going sufficiently slow for a man to get off without injury? A. Yes, sir; I have got off lots of times that slow."

The testimony tended further to prove that just about or after the train had passed the platform the conductor looked for the plaintiff, and, not seeing him, and observing that the train had passed the depot platform so slowly, he thought that he had alighted from the caboose in safety, and thereupon he gave a signal to the engineer not to stop, but to go on, and the train increased its speed, and it did not stop at all. The evidence shows that it was dark when the plaintiff attempted to alight from the train; but it also shows that the plaintiff was well acquainted with the platform and surrounding conditions at that place; that he was active in his movements, and was accustomed to alight from trains.

Upon the trial of the case, a verdict was returned in favor of plaintiff, and the railway company has appealed.

It is contended by counsel for defendant that according to the testimony most favorable to the cause of plaintiff the court should have directed a verdict against his right to recover. It is urged that the defendant under this testimony was not liable for plain-

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tiff's injury, because the failure to stop the train at the station was not the proximate cause thereof, which, it is claimed, was solely the result of his leaving the train while it was in motion. It is also urged that according to the testimony the plaintiff was guilty of contributory negligence in going to the steps of the caboose and attempting to alight therefrom while the train was in motion, or that he thereby voluntarily assumed the risk of any injury resulting therefrom.

[1] It is well settled, we think, that it is the duty of a railroad company as a carrier of passengers to stop its trains at a station which, by its regulations, it has designated as a place for stopping, and to there remain for a sufficient time to permit its passengers, in the exercise of ordinary diligence and care, to safely leave its trains. The passenger must not only be carried properly and safely, but he must be carried to the end of his journey for which he has paid his fare; and he must be put down at the usual stopping place at the end of such journey.

[2] Unless the proof shows that, according to the regulations of the company, or a custom in handling trains, a distinction is made between trains exclusively employed in carrying passengers and those engaged in carrying freight and passengers, it is the duty of a railroad company to transport the passenger on either kind of train to the usual stopping place, and there stop its trains and permit the passenger to alight therefrom. 2 Hutchinson on Carriers (3d Ed.) § 1117.

[3] In the case at bar, there is no evidence that any distinction was made in this regard by any rule, regulation, or custom of defendant between the two kinds of trains. The plaintiff had the right to act upon the belief and assumption that the defendant would stop its train at the usual stopping place at Cove, so that he could there alight. When the train slackened its speed and approached the platform slowly, the plaintiff was therefore warranted in the belief that it was about to and would stop there, and was justified in acting upon that belief. It then became a question for the jury to say whether or not the plaintiff acted with ordinary prudence when he left the caboose and proceeded to the steps thereof preparatory to alighting.

It is contended that the plaintiff was guilty of an act of negligence contributing to his injury by going upon the steps of the caboose while the train was still in motion, and before it had actually stopped; and to sustain this contention we are cited to the cases of *St. L., I. M. & S. R. Co. v. Rush*, 86 Ark. 325, 111 S. W. 263, and *C., R. I. & Pac. R. Co. v. Claunts*, 138 S. W. 332. But we do not think that the principle advanced in those cases is applicable to the facts of this case. In those cases the train had not stopped at the station, and the passenger was not notified or informed that the train would stop at the station. On the contrary, the passenger knew that the train would not stop, and took his

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position upon the steps of the coach without direction from any employee of the carrier, and without any right to believe or assume that the train would stop. In those cases the passenger, while at a place where he had no right to be, and without the knowledge of the carrier's employees of his position, was thrown from the train by the sudden increase in the movement thereof. It was there held that the train operators had a right to assume that the passenger was in his place in the coach, and could move the train as they saw proper, as long as such movement was not calculated to injure passengers who were in such places as would naturally be expected of careful passengers.

[4] In the case at bar, according to the regulations of the defendant, the train should have stopped at this station, and plaintiff had a right to assume, when it slackened its speed and slowly approached the station, that the train would stop at that place. This was the place to which the defendant had agreed to carry him and put him down; and it cannot be said, as a matter of law, under these circumstances, that the plaintiff was negligent in going to the steps of the caboose preparatory to alighting from the train. At the time he attempted to alight, the train was moving slowly; but it was passing the depot platform, and did not stop. Under the circumstances, the jury may well have been warranted in finding that the plaintiff, after he had reached the steps of the caboose, believed, and was justified in believing, that the train was not going to stop at the station, but would carry him past his destination. An emergency was thus presented, and a necessity for sudden action placed upon the plaintiff. This was caused by the negligence of the defendant in failing to stop its train at the station. The plaintiff, by this act of negligence on the part of the defendant, was either required to undergo the inconvenience and annoyance of being carried past his station if he remained upon the train, or to leave the train while still in motion.

[5] If, as a matter of law, he was not guilty of contributory negligence in leaving the moving train under the circumstances of this case, then the injury which he sustained was due to the sole negligence of the defendant in failing to stop its train, which was the proximate cause thereof. The immediate efficient cause of the plaintiff attempting to leave the train was the omission of the defendant to stop its train, and its act in passing the station; this created a situation that necessitated immediate action on plaintiff's part. The act of plaintiff in alighting from the train was only an incidental cause contributing to the injury, which was induced by the defendant's negligent failure to stop its train. If in thus acting the plaintiff was negligent, he would then, and only then, be precluded from a recovery because of his contributory negligence. *L. R. & Ft. S. Ry. Co. v. Atkins*, 46 Ark. 423; 3 Hutchinson on Carriers (3d Ed.) § 1430; 29 Cyc. 500.

[6] The question as to whether or not a passenger is guilty, as a matter of law, of contributory negligence, precluding a recovery, for an injury sustained by attempting to alight from a train while moving past the station at which it should stop to enable him to alight has been decided differently by different courts. This court has steadily adhered to the view that the attempt of a passenger to alight from the train while it is passing the place where it should stop to permit him to leave it will not, as a matter of law, be deemed an act of negligence upon his part, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds could fairly arrive at no other conclusion. Otherwise it becomes a question for a jury to determine whether or not such attempt to leave the train while in motion is one of negligence.

In the case of *L. R. & Ft. S. R. Co. v. Atkins*, *supra*, it was held that it was not negligence per se for a passenger to leave a moving train.

In the case of *St. L., I. M. & S. R. Co. v. Cantrell*, 37 Ark. 526, 40 Am. Rep. 105, this court said: "It may, as a general proposition, be said that it is imprudent or a want of ordinary care to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. It would not be so if the train was moving so slowly that no damage could be reasonably apprehended."

In the case of *Railway Co. v. Tankersley*, 54 Ark. 25, 14 S. W. 1099, the court, speaking through Mr. Justice Hemingway, said: "If it would seem to a person of ordinary prudence and caution to be safe to step off, considering the train's speed, the situation at the place of alighting, the opportunity to see where the step was made, and the activity of the person making it, and all other circumstances reasonably affecting the safety of the attempt, it could not be deemed negligence in the plaintiff to do it." *M. & L. Ry. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *St. L., I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256; *St. L., etc., R. Co. v. Person*, 49 Ark. 184, 4 S. W. 755; *St. L., I. M. & S. R. Co. v. Leamons*, 82 Ark. 504, 102 S. W. 363; *Ark. Cent. Ry. Co. v. Bennett*, 82 Ark. 393, 102 S. W. 198; *St. L., I. M. & S. R. Co. v. Rush*, *supra*; *C., R. I. & Pac. R. Co. v. Claunts*, *supra*; 3 Thompson on Negligence, § 3055; 3 Hutchinson on Carriers (3d Ed.) § 1179.

The failure to stop a train at a station will not justify a passenger in attempting to alight under circumstances which are obviously hazardous. But if the necessity of leaving the train while in motion has been put upon the passenger by the negligence of the carrier, by failing to stop its train at the station, then contributory negligence will not be imputed to the passenger from

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the fact of his attempting to alight from the moving train, if, under the circumstances of the case, such act was not a reckless or imprudent one. Under the circumstances of this case, we are of the opinion that it was a question for a jury to determine whether or not the plaintiff was guilty of contributory negligence in attempting to leave the train as he did, while it was in motion.

Counsel for appellant have called to our attention a number of assignments of error, which they claim the court made in its rulings upon the instructions. We have examined each of these assignments, and fail to find that any of them is well founded. The instructions which the court gave are in conformity with the above principles, which we think are applicable to the facts, and the instructions cover correctly every issue that was involved in a fair determination of the merits of this case. We do not think it would serve any useful purpose to note these assignments in detail. By these instructions, the case was fully submitted to the jury upon the issues, first, as to whether or not the defendant was negligent in failing to stop its train at its station at Cove; and, second, as to whether or not plaintiff was guilty of contributory negligence in going to the steps of the coach, and in leaving the train while it was in motion, under the circumstances of this case. Upon these issues the jury returned a verdict in favor of the plaintiff, and we are of the opinion that it is sustained by sufficient evidence.

The judgment is accordingly affirmed.

KIRBY, J., dissents.

GALLOWAY *v.* DETROIT UNITED RY.

(Supreme Court of Michigan, Jan. 23, 1912.)

[134 N. W. Rep. 10.]

Negligence—Imputed Negligence.*—The negligence of one common carrier upon whose conveyance a passenger is injured cannot be imputed to the passenger so as to bar recovery against another carrier, where the injury results from their concurrent negligence.

Trial—Direction of Verdict.—In order to authorize the direction of a verdict for defendant in a negligence action, there must have been no evidence tending to show negligence.

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by James S. Galloway against the Detroit United Railway. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

Plaintiff hired a taxicab from the Bailey Auto Company of the city of Detroit and directed the driver to convey himself and daughter to Grosse Pointe. He gave no further directions to the driver and did not attempt to control his actions either in a selection of the route or in the matter of speed. At the corner of Jefferson and Field avenues in said city, defendant maintains a Y upon which it turns its Trumbull Avenue cars. Those cars run easterly for some distance upon the southerly Jefferson Avenue track. At Field avenue they Y up in a northerly direction, then turn, and proceed west on the northerly Jefferson Avenue track. When the taxicab in which plaintiff was a passenger approached Field avenue it was following a Trumbull Avenue car at a distance of about one-half block, running with the right-hand wheels outside the southerly rail of the south or east bound track. The left-hand wheels of the machine were, of course, between the rails of that track. When the street car reached the Y at the junction of Field and Jefferson, it stopped and almost immediately thereafter started to back around the Y up Field avenue. It had backed but a few feet when it came into collision with the right hind wheel of the taxicab, which at the moment had turned out and was attempting to pass the car to the left. As a result of the collision, the taxicab was turned part way around. It dashed over to the north curb, struck and demolished a fire hydrant, and upset, pinning its occupants beneath it. This action is brought by the plaintiff to recover compensation for in-

*See first paragraph of foot-note of *Flynn v. Chicago City Ry. Co.* (Ill.), 41 R. R. R. 627, 64 Am. & Eng. R. Cas., N. S., 627; last foot-note of *Louisville & N. R. Co. v. Calvert* (Ala.), 40 R. R. R. 8, 63 Am. & Eng. R. Cas., N. S., 8.

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juries sustained by him as a result of the collision. The charge, was, in part, as follows: "It is an open matter for you to say whether the handling of the car caused the accident, or whether the handling of the cab caused the accident. And I charge you now absolutely that, if the taxi made the accident, there can be no recovery in this case. It must be caused by the D. U. R. alone to bind them, for they are the defendants. * * * When you get into your jury room and select your foreman, the usual practice is to take a ballot. And in an accident case like this, or in a negligence case, for we use that term, you would vote guilty or not guilty. It does not mean guilty of crime. It is not a criminal matter. But it means guilty of negligence. Guilty or not guilty, and if you can agree on not guilty, you will come in and find no cause of action. And if you find guilty, that would mean that the D. U. R. is guilty over and above anything that happened. That nobody else caused it; that they were guilty. * * * It is not for the court, and with the fact that, if the accident was caused by the taxicab driver, there can be no recovery, and if caused solely by the railway there could be a recovery, I will leave the case solely to you." A verdict under the foregoing instructions having been rendered in favor of defendant, plaintiff reviews his case in this court by writ of error.

Argued before BIRD, STEERE, McALVAY, BROOKE, and BLAIR, JJ.

John T. Nichols (James G. McHenry, of counsel), for appellant.

Corliss, Leete & Joslyn (A. B. Hall, of counsel), for appellee.

BROOKE, J. (after stating the facts as above). Counsel for defendant frankly concedes that in instructing the jury that plaintiff could not recover unless he showed that the driver of the taxicab acted without negligence, and that his injuries were due solely to the negligence of the defendant, the learned circuit judge was in error.

[1] It seems now to be settled, in this state at least, that, where one suffers an injury through the concurrent negligence of two common carriers, the negligence of the one upon whose conveyance the injured person is a passenger cannot be imputed to the passenger so as to bar his recovery against the other. *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

But it is urged on behalf of defendant that this verdict should not be disturbed because (it is claimed) the court should have granted defendant's motion for a directed verdict upon the ground that plaintiff had failed to show any negligence on the part of the defendant which contributed to cause the injury to plaintiff.

Plaintiff produced evidence which (if true) tended to show

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that defendant by its agents stopped its car and suddenly, without warning, backed it up the Y across the northerly portion of Jefferson avenue, at a time when the conductor, instead of being upon the back end of the car and maintaining a proper lookout, was in the forward portion of the car where he could not see the approaching taxicab.

[2] This testimony was sharply contradicted by witnesses on behalf of defendant, but this is not a proper occasion to discuss the weight of the evidence. To entitle the defendant to a directed verdict, there must have been no evidence tending to show its culpability in the premises.

We are unable to agree with counsel for defendant in his contention.

The judgment must be reversed, and a new trial ordered.

SOUTH COVINGTON & C. R. Co. v. CITY OF COVINGTON.

(Court of Appeals of Kentucky, Feb. 6, 1912.)

[143 S. W. Rep. 28.]

Municipal Corporations—Police Power—Overcrowding and Disinfection of Street Cars.*—Under Ky. St. § 3058, subsec. 2 (Russell's St. § 1042, subsec. 2), providing that the general council shall have the power to license and regulate street railways, and subsection 25, providing that such council may pass any ordinance not inconsistent with the laws of the state which may be expedient in maintaining the peace, good government, health, and welfare of the city, the general council of a city has power to pass an ordinance regulating the overcrowding of street cars, and providing for their disinfection.

Constitutional Law—Impairing Contract—Police Powers.—The enactment by a municipality of an ordinance directing a street car company to charge a certain fare and to run its cars in a certain manner, providing that nothing therein should be construed as any surrender or waiver of the rights of either the company or city, and the acceptance by the street railway company, did not create a contract which prevented subsequent regulation, for a city cannot contract away its governmental power, and in this case there was an express reservation.

Commerce—Transportation.—Regulation by a municipality of a street railway operated by a state corporation and which carried passengers only to the state line where they were delivered to a foreign corporation is not an interference with interstate commerce.

*See last foot-note of *City of Chicago v. Chicago, etc., R. Co.* (Ill.), 41 R. R. R. 596, 64 Am. & Eng. R. Cas., N. S., 596; foot-note of *City of Tacoma v. Boutelle* (Wash.), 39 R. R. R. 404, 62 Am. & Eng. R. Cas., N. S., 404.

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Street Railroads—Police Power—Overcrowding Cars—Reasonable Regulation.—A municipal ordinance providing that a street car company shall not allow more than a certain number of passengers on its cars is not unreasonable because it provides no method of preventing passengers from congregating on the platforms from choice.

Street Railroads—Police Power—Fumigation of Cars—Reasonable Regulation.*—A municipal ordinance requiring the weekly fumigation of street cars, and that they be kept at a temperature of not less than 50 degrees Fahrenheit, is not an unreasonable requirement in favor of public health.

Street Railroads—Police Power—Overcrowding Cars—Reasonable Regulation.*—A municipal ordinance providing that it is the duty of all street car companies to operate cars in sufficient numbers to reasonably accommodate the public, when interpreted with the common-law rule that it is the duty of a common carrier to provide reasonable accommodations for such passengers as in the exercise of ordinary care can be anticipated, is not unreasonable.

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by the South Covington & Cincinnati Railway Company against the City of Covington. From a judgment for defendant, plaintiff appeals. Affirmed.

Ernst, Cassatt & Cottle, for appellant.

Jno. E. Shepard and Stephens L. Blakely, for appellee.

HOBSON, C. J. [1] The general council of the city of Covington passed the following ordinance, which was duly approved by the mayor on October 24, 1910:

“An ordinance to further regulate the operation of street cars and street car lines in the city of Covington, and providing for the health, comfort and safety of passengers using said cars and providing penalties for the violation thereof.

“Be it ordained by the general council of the city of Covington:

“Section 1. That it shall be unlawful for any person, corporation or company owning or operating street cars for the carriage of passengers for hire in or through or over the public streets of the city of Covington, to permit more than one third greater in number of passengers to ride or to be transported within such cars over and above the number for which seats are provided in the same, provided that this section shall not apply to or to be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

“Sec. 2. No such person, company or corporation shall suffer

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or permit any passenger or person to ride upon the rear platform of any such car unless the same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car, and no one shall be permitted to stand in such place so provided for such ingress and egress but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for egress and ingress upon request of the conductor in charge of said car shall be guilty of a misdemeanor and be subject to a fine of not less than five dollars nor more than fifty dollars, recoverable in the police court of said city.

"Sec. 3. No such person, company or corporation shall suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform, said space allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car without interfering or crowding from the other person upon said platform, if any, and no person or passengers shall ever be permitted to stand by or remain within the enclosure thus provided for the motorman.

"Sec. 4. It shall be the duty of every such person, company or corporation to at all times keep its cars thoroughly cleaned and ventilated, and shall at least once a week fumigate the inside of said cars with efficient disinfectant, and the board of health of the city of Covington shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and all such persons, companies or corporations shall comply with such reasonable rules.

"Sec. 5. The temperature of such cars shall never be permitted to be below 50 degrees Fahrenheit.

"Sec. 6. It is hereby made the duty of every company, person or corporation, operating street cars and the street car lines within the corporate limits of the city of Covington, to run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the general council of the city of Covington, may by resolution at any time direct that the number of cars operated upon any line or route be increased to a sufficient number to so accommodate the public, if there is a failure in that respect. Any such person, company or corporation failing or refusing to run or operate sufficient cars as by this section provided shall be subject to the penalties provided by section 2 hereof.

"Sec. 7. Any person, company or corporation, violating either of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than

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fifty nor more than one hundred dollars for each offense, recoverable in the police court of the city of Covington, and each car operated in violation of this ordinance shall constitute a separate offense for each day it is so operated, and it is hereby made the duty of all police officers of such city and others exercising police power to see to the enforcement of this ordinance, and to arrest or to cause the arrest of all persons guilty of its infraction. And the chief of police is hereby directed to assign at least one police officer to the special enforcement of this ordinance. It shall be the duty of such officer to examine and observe street cars in operation and to make arrests and cause proper prosecutions to be started against offenders violating this ordinance.

"Sec. 8. Nothing contained in this ordinance shall be held or construed to be or to effect a renewal or an extension or enlargement of the right of any person, company or corporation to use or occupy the streets and highways of the city of Covington for street railway purposes.

"Sec. 9. This ordinance shall take effect thirty days from and after its passage and approval by the mayor."

On November 22, 1910, the South Covington & Cincinnati Street Railway Company brought this suit against the city and its authorities to enjoin the enforcement of the ordinance on several grounds. The circuit court on final hearing dismissed the action. The railway company appeals.

1. It is insisted that the city is without power to pass the ordinance. The statute regulating cities of the second class, including Covington, contains, among other things, this provision: "The general council shall have power by ordinance * * * to license, tax and regulate * * * street railway companies or corporations." Section 3058, Ky. St., subsec. 2 (Russell's St. § 1042, subsec. 2). "To pass all such ordinances, not inconsistent with the provisions of this act or the laws of the state, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power." Section 3058, Ky. St., subsec. 25. We have in the Kentucky Statutes a number of provisions regulating railways providing as to the maintenance of waiting rooms, the keeping open of ticket offices, the posting of tariffs, and a number of other regulations of a similar character. That the Legislature in the exercise of its police power may enact such regulations is not now seriously disputed; and we think it evident that the General Assembly has conferred upon the municipality similar power as to street railways within the city. These are matters concerning primarily the citizens of the city, and may be better regulated by the local authorities who are cognizant of the local situation than by gen-

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eral laws passed by the General Assembly. The overcrowding of street cars with the troubles which naturally ensue, the providing for clean, sanitary, and comfortable cars, and the requiring of a reasonably efficient service are matters that the city may properly regulate under the police power.

[2] 2. It is insisted that the subject is covered by contract, and may not be controlled by the municipality. In October, 1892, an ordinance was passed by the city of Covington which provided a number of things that the street car company were to do. Among other things, it was provided by ordinance that the street car company should charge a five-cent fare, and that it should run its cars during certain hours at intervals not to exceed seven minutes. This ordinance was accepted and agreed to by the railway company, but it is manifest from the ordinance as a whole that it was not contemplated by either of the parties that it should tie the hands of the city for all time or prevent it from requiring what was reasonable and necessary when conditions changed. The city of Covington has doubled in size since that ordinance was passed, conditions are entirely different, and it is perfectly evident from the ordinance that the council was only dealing with the situation then before it. It did not attempt to contract away the power of the council to deal with other and different conditions as changes might come in the future. Among other things the ordinance contains this express language: "It is further distinctly understood and agreed by said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company." The city could not contract away its governmental power, and it manifestly did not attempt to do so. *Lexington Turnpike Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518; *Commonwealth v. Covington & Cinn. Bridge Co.*, 21 S. W. 1042, 14 Ky. Law Rep. 836; *Georgia R. Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; *Chicago, etc., R. Co v. Ill.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

[3] 3. It is insisted that the ordinance interferes with interstate commerce. The railway company is a Kentucky corporation. It has no franchise or property except in Kentucky. While its cars run into Cincinnati, when they pass the state line, they are operated by an Ohio corporation. The Kentucky corporation is not engaged in interstate commerce. It simply carries the passengers to the state line. The Ohio corporation there receives them and carries them on to their destination in Cincinnati. We are utterly unable to see that there is any question of interstate commerce in the case. The ordinance is only in force in the city of Covington, and certainly the state of Kentucky may regulate a common carrier doing no business except in the state of Kentucky, and having no property except here. *Missouri Pac. R. R. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472.

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[4] 4. Lastly, it is insisted that the ordinance is unreasonable, arbitrary, and impracticable. Covington and Newport are on the south side of the Ohio river opposite Cincinnati. Newport is separated from Covington by the Licking river. The two cities have a population of something over 75,000. The Newport cars pass through Covington in going to and from Cincinnati. In addition to this, there are Latonia, Ludlow, South Covington, and several smaller places near by, the cars from which pass through Covington. A large part of the male population in these cities work in Cincinnati. The result is that in the morning hours, when the workers are going out to work, and in the evening hours, when they are returning from work, there is great congestion on the cars, by reason of which the passengers are subjected to dangers and are sometimes delayed in getting to and from their work, and are made more or less uncomfortable during the journey. Especially is this true of ladies on the very crowded cars. The ordinance was enacted to remedy this situation. It is insisted that the cars are capable of carrying without danger to person or health a greater number of passengers than permitted by the ordinance; that some cars have a greater capacity than others in the matter of standing passengers on the rear platform; that the ordinance limits the number of passengers permitted to stand within the cars, but places no limit on the number which may be permitted to stand on the back platform, and that the company will be without power to prevent these passengers from going into the car at pleasure, as the conductor will be engaged in taking up his fares; that the ordinance provides for no fine against the passengers violating its provisions; that the company cannot prevent people from getting on the cars in greater numbers than the ordinance permits; that the requirement of fumigation of each car once a week is unnecessary and unreasonable; and, that owing to the facilities which the company has in Cincinnati, it will be impracticable for it to run cars at less intervals than it now runs them. We are unable to see that the ordinance is invalid for any of these reasons. It is a reasonable requirement that the number of passengers which shall be permitted to ride within the car shall not be more than one-third greater than the seating capacity of the car. When a greater number of people are permitted to be in a car, there is certainly a more or less tendency to create disorders, and to bring about conditions not favorable to the health or comfort of the passengers. If the conductor is engaged in taking up his fares, some arrangement can be made to keep passengers out of the car, or an extra man may be employed for this purpose. The company has charge of its car, and it can refuse to take on other passengers, and, if a passenger is allowed to get on the rear platform when there is no room in the car, he may be prevented from entering the car. If the company cannot provide the necessary accommodations for

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the traveling public on the cars it has, it must provide itself with more cars. It is a public servant created for a public purpose, and while it enjoys its franchise, it must discharge the duties imposed upon it by the franchise. If it cannot run its cars singly, and carry the crowd, it must run trailers, or it must use larger cars. The cars it uses were adequate when the population of these cities was half what it is now, but, if larger cars are required by the increased population, then larger cars must be provided or the smaller cars must be run as trailers.

[5] We do not see that sections 4 or 5 are arbitrary or unreasonable. As shown by modern science, a large percentage of disease is communicated by germs, and, when many people are carried in cars, these germs are liable to find lodgment there. We cannot say that the fumigation of a car once a week is an unreasonable requirement, or that it is unreasonable to require the cars to be kept at a temperature of not less than 50 degrees Fahrenheit.

[6] The rule at common law is that a carrier must provide reasonable accommodations for such a number of passengers as in the exercise of ordinary care he has reason to anticipate will demand to be carried. This rule of the common law is to be read into section 6 of the ordinance. It is the duty of the defendant under the ordinance to run and operate cars in sufficient numbers at all times to reasonably accommodate the public as there provided, in so far as in the exercise of ordinary care it has reason to anticipate that such an amount of accommodation will be necessary. When section 6 is thus read, it is not unreasonable or arbitrary or impracticable of enforcement. The company will not be responsible for not furnishing a sufficient accommodation to accommodate a crowd which it has not reason in the exercise of ordinary care to anticipate. But it should exercise ordinary care to provide cars that will reasonably accommodate the passengers which may reasonably be anticipated.

Judgment affirmed.

SURE *v.* MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Supreme Court of Wisconsin, Jan. 9, 1912.)

[133 N. W. Rep. 1098.]

Carriers—Injury to Passenger—Meddlesome Act of Fellow Passenger—Carrier's Liability.*—Carriers not being responsible for acts of third persons not under their control which they could not reasonably foresee, a street railroad company is not liable for injury to a passenger injured while standing in the rear vestibule of a car through the meddlesome act of a fellow passenger in suddenly releasing a brake in such manner that the handle swung around with great force; there being no showing of previous and similar meddlesome acts of passengers.

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Action by Julius H. Sure against the Milwaukee Electric Railway & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Action for personal injuries. On the 27th day of February, 1908, plaintiff boarded one of defendant's cars standing at the east end of the North Avenue line, and became a passenger thereon. The car was soon to start upon its return trip. The plaintiff was smoking and stood in the rear vestibule, as required by the rules of the company. The rear brake was set in order to hold the car in its position until it was ready to start, and the plaintiff stood very close to the handle thereof, which is a heavy brass handle such as is usual in city street cars. Just as the motorman started the car, or just after he had started it, a boy standing on the rear platform intentionally and without authority from the conductor, but with the idea of assisting in the operation of the car, released the brake, and either accidentally or otherwise let go of the handle, and it swung around with considerable rapidity and force, striking the plaintiff a blow in the stomach of some severity and for which this action is brought.

The brake and its mechanism are thus correctly described in respondent's brief: "The brake handle swings freely towards

*See generally foot-note of *St. Louis Southwestern Ry. Co. v. Bradley* (Ark.), 41 R. R. R. 488, 64 Am. & Eng. R. Cas., N. S., 488; first head-note of *Kline v. Milwaukee, etc., Co.* (Wis.), 41 R. R. R. 218, 64 Am. & Eng. R. Cas., N. S., 218; foot-note of *Louisville & N. R. Co. v. Renfro* (Ky.), 40 R. R. R. 707, 63 Am. & Eng. R. Cas., N. S., 707; second head-note of *Hale v. Chesapeake & O. Ry. Co.* (Ky.), 40 R. R. R. 157, 63 Am. & Eng. R. Cas., N. S., 157; first foot-note of *Glennen v. Boston Elev. Ry. Co.* (Mass.), 39 R. R. R. 455, 62 Am. & Eng. R. Cas., N. S., 455; *Jansen v. Minneapolis, etc., Ry. Co.* (Minn.), 39 R. R. R. 11, 62 Am. & Eng. R. Cas., N. S., 111.

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the left or anti-clockwise, but, when moved clockwise, the ratchet in the handle at the point where the handle is attached to the brake staff engages the brake staff and turns the entire staff so as to wind up a chain fastened at the lower end of the staff and under the platform of the car. When the chain is wound up to the desired point, a ratchet wheel, through which the brake staff passes, and which is keyed firmly to the staff, is engaged by a dog being pressed against the ratchet by the foot of the operator, and the staff is thus held until the brake handle is forcibly moved clockwise far enough to disengage the dog from the ratchet, or until the dog is by some other method forcibly removed from the ratchet. At all times, except when the dog is engaged, the brake handle moves freely anti-clockwise." It was the conductor's duty to loosen this brake at about the time the car started, and the conductor testified that just as or just after he gave the motorman the signal to start he was coming out of the back door of the car to release the brake, and it was released by the boy.

The jury returned the following verdict:

"Question 1: Did the witness Harold Krebs release the brake at the time of the accident? Answer. Yes.

"Question 2: If you answer question No. 1 'yes,' then answer: Was such release of the brake by Harold Krebs the proximate cause of the injury to the plaintiff? Answer: Yes.

"Question 3: Ought the defendant, in the exercise of ordinary care, to have anticipated that the brake, if left in a set position, might be released by a jar or jolt caused by the operation of the car? Answer: No.

"Question 4: Ought the defendant, in the exercise of ordinary care, to have anticipated that the brake, if left in a set position, might be released by a person upon the car not an employee? Answer: Yes.

"Question 5: Was the failure of the defendant to exercise the care described in the third and fourth questions, or either of them, the proximate cause of the injury to the plaintiff? Answer: Yes.

"Question 6: Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? Answer: No.

"Question 7: What sum will reasonably compensate the plaintiff for the injury which he sustained? Answer: \$1,000."

On motion the court changed the answers to the fourth and fifth questions from "Yes" to "No," and rendered judgment for the defendant on the verdict, from which the plaintiff appeals.

Rubin & Lehr (Horace B. Walmsley, of counsel), for appellant.

Van Dyke, Rosecrantz, Shaw & Van Dyke, for respondent.

WINSLOW, C. J. (after stating the facts as above). The brake in question and all the machinery connected with it seem to have

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been of approved pattern, in excellent condition, and were absolutely essential machinery for the proper operation of the car. So far as appears in the case, it would not be possible to have a brake covered or so firmly fastened in position that a passenger could not release it if he deliberately endeavored to do so, and yet have it capable of instant release by an employee when the necessities of the service required. There are numerous appliances of this nature connected with the transportation of passengers by steam and by electricity as well.

The general principle often decided is that a carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the car or train; that the meddler becomes thereby a trespasser, and, if injury results to another passenger by his act, the carrier will not be liable in the absence of any other ground of negligence. Carriers are rightly held to a high degree of diligence, but they are not held responsible for the lawless acts of third persons not under their control, which they could not reasonably anticipate. *McDonnell v. Railway Co.*, 35 App. Div. 147, 54 N. Y. Supp. 747; *McDonough v. Railroad Co.*, 95 App. Div. 311, 88 N. Y. Supp. 609; *Moore v. Woonsocket Ry. Co.*, 27 R. I. 450, 63 Atl. 313, 114 Am. St. Rep. 59; *Krone v. Railway Co.*, 97 Mo. App. 609, 71 S. W. 712. While there is some evidence in the case to the effect that passengers sometimes played with the brake, or leaned against it, or touched the dog with their feet, there is absolutely nothing in the evidence to show that a passenger was ever known to deliberately loosen it when properly set as in this case. Had the brake here been released by accident, by reason of a passenger's striking the dog with the foot, and releasing it, or in some other purely accidental way, the question presented would be of a different character.

On the undisputed facts presented, a verdict for the defendant should have been directed, on the ground that no negligence was shown.

Judgment affirmed.

THORSON v. GROTON & S. ST. RY. CO.

(Supreme Court of Errors of Connecticut, Dec. 19, 1911.)

[81 Atl. Rep. 1024.]

Carriers—Injuries to Passengers—Notice—Requisites.—The purpose of Gen. St. 1902, § 1130, requiring written notice containing a general description of the injury and of the time, place, and cause of its occurrence as a condition precedent to the maintenance of an action against a railway company, is to enable the company to ascertain the facts within a reasonable time after the occurrence, and a notice which is sufficient for that purpose is good.

Carriers—Injuries to Passengers—Notice—Requisites.—A notice of injury to a trolley car passenger which alleges that, while plaintiff was a passenger on a car which left N. for G. at about 10:45 p. m. on a designated date, she was struck on the head by the falling of one of the transoms of the car, bruising and injuring her head, brain, and nervous system, and that the injuries were inflicted on plaintiff while she was on the car shortly after the taking of the first fare and before taking the second, sufficiently gives a general description of the injury and of the time, place, and cause of its occurrence within Gen. St. 1902, § 1130.

Carriers—Injuries to Passengers—Evidence—Sufficiency.*—A trolley car passenger was injured by the falling of a ventilator. Shortly before the accident the ventilator had been opened by the conductor. The passenger was in a seat directly beneath the ventilator. The cause of the fall of the ventilator was not shown, but the evidence showed that it was so constructed that it could not fall from its place if the fixtures and fastenings were in proper condition and properly cared for. Held to prima facie show actionable negligence, without proof of any specific defect in the ventilator or any particular act of misconduct in its management or inspection constituting the negligence causing the injury.

Carriers—Passengers—Obligation of Carriers.†—Carriers are not insurers of the safety of their passengers, but they must exercise the highest practical degree of human skill to carry them in safety.

*See foot-note of *Birmingham, etc., Co. v. McCurdy* (Ala.), 41 R. R. R. 516, 64 Am. & Eng. R. Cas., N. S., 516; last foot-note of *LeDeau v. Northern Pac. Ry. Co.* (Idaho), 41 R. R. R. 232, 64 Am. & Eng. R. Cas., N. S., 232; first paragraph of second foot-note of *Parker v. Boston & M. R. R.* (Vt.), 41 R. R. R. 153, 64 Am. & Eng. R. Cas., N. S., 153; last foot-note of *McDonough v. Boston Elev. Ry. Co.* (Mass.), 40 R. R. R. 704, 63 Am. & Eng. R. Cas., N. S., 704; *McKittrick v. Greenville Tract. Co.* (S. Car.), 40 R. R. R. 147, 63 Am. & Eng. R. Cas., N. S., 147; second foot-note of *Pittsburg, etc., Ry. Co. v. Grom* (Ky.), 39 R. R. R. 747, 62 Am. & Eng. R. Cas., N. S., 747; first foot-note of *John v. Northern Pac. Ry. Co.* (Mont.), 39 R. R. R. 484, 62 Am. & Eng. R. Cas., N. S., 484; second foot-note of *Sherman v. Southern Pac. Co.* (Neb.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407.

†See foot-note of *St. Louis, etc., Ry. Co. v. Purifoy* (Ark.), 41

Thorson v. Groton & S. St. Ry. Co

Appeal from Court of Common Pleas, New London County;
Charles B. Waller, Judge.

Action by Anne Thorson against the Groton & Stonington Street Railway Company. From a judgment for plaintiff for \$375, defendant appeals. Affirmed.

Charles W. Comstock and Lee R. Robbins, for appellant.

Philip Z. Hankey, for appellee.

RORABACK, J. The complaint in part alleges that the plaintiff while seated as a passenger in a trolley car of the defendant company, through the negligence of the defendant in not properly maintaining, caring for, and inspecting its car, was injured by the falling of a transom from its place over a window, which transom struck the plaintiff on her head. The plaintiff annexed to and made a part of her complaint a written notice containing an alleged description of her injuries, of the cause thereof, and of the time and place of their occurrence. The defendant demurred to the complaint on the grounds that this notice was insufficient in its description of the cause of the alleged injuries, and the place of its occurrence. The demurrer was overruled. This action of the court is one of the reasons of appeal.

[1] Gen. St., § 1130, requires as a condition to the maintenance of an action against a railway company that "written notice containing a general description of the injury, and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant within four months after the neglect complained of, unless the action itself commenced within said period of four months." The object of this requirement is that the railway company may investigate and ascertain the facts within a reasonable time after the occurrence of the alleged injury. It is manifest that no specific rule can be laid down which will govern in all cases. The sufficiency

R. R. R. 526, 64 Am. & Eng. R. Cas., N. S., 526; last paragraph of first foot-note of *LeDeau v. Northern Pac. Ry. Co.* (Idaho), 41 R. R. R. 232, 64 Am. & Eng. R. Cas., N. S., 232; second head-note of *Parker v. Boston & M. R. R.* (Vt.), 41 R. R. R. 153, 64 Am. & Eng. R. Cas., N. S., 153; *Stephens v. Oklahoma City Ry. Co.* (Okla.), 40 R. R. R. 569, 63 Am. & Eng. R. Cas., N. S., 569; *Birmingham, etc., Ry. Co. v. Yates* (Ala.), 40 R. R. R. 170, 63 Am. & Eng. R. Cas., N. S., 170; *Kennedy v. Chesapeake & O. Ry. Co.* (W. Va.), 40 R. R. R. 152, 63 Am. & Eng. R. Cas., N. S., 152; *Glennen v. Boston, etc., Ry. Co.* (Mass.), 39 R. R. R. 455, 62 Am. & Eng. R. Cas., N. S., 455; fifth foot-note of *Washington, etc., Ry. Co. v. Vaughn* (Va.), 39 R. R. R. 444, 62 Am. & Eng. R. Cas., N. S., 444; last foot-note of *Houston, etc., R. Co. v. Bush* (Tex.), 39 R. R. R. 428, 62 Am. & Eng. R. Cas., N. S., 428; *Pelot v. Atlantic, etc., R. Co.* (Fla.), 39 R. R. R. 369, 62 Am. & Eng. R. Cas., N. S., 369; last foot-note of *Pittsburg, etc., Ry. Co. v. Grom* (Ky.), 39 R. R. R. 747, 62 Am. & Eng. R. Cas., N. S., 747; *Hill v. Minneapolis St. Ry. Co.* (Minn.), 39 R. R. R. 107, 62 Am. & Eng. R. Cas., N. S., 107.

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of the notice must be determined to some extent by the facts of the case. Its sufficiency is also to be considered with reference to the purpose for which it is required. If sufficient for that purpose, it is a good notice. *Budd v. Meriden Electric R. Co.*, 69 Conn. 272, 285, 37 Atl. 683.

[2] The notice before us states that "on May 5, 1909, while the plaintiff was a passenger for hire in one of the cars of your company, which car left the village of Noank for Groton Bank in the town of Groton at about 10:45 p. m. on said day, she was struck on the head by the falling of one of the transoms or windows in the top of said car, which bruised and injured her head, brain, and nervous system. Said injuries were inflicted upon the undersigned while she was in transit on said car from said Noank to said Groton shortly after the taking of the first fare, and before taking the second." The falling of the ventilator was the cause of the accident. This occurred in the nighttime upon a moving car. This car, the notice states, left the village of Noank for Groton at 10:45 p. m. and shortly after the taking of the first fare and before taking the second. Under such circumstances, information as to the precise location of the defendant's car when the plaintiff was injured would not have materially assisted the defendant in investigating this claim. In the language of the statute upon this subject, such a description of the place was as near as the same could be ascertained.

The defendant also contends that the notice to it as to the cause of the injury was valueless as the negligent acts complained of were not set forth in the notice. The office of the notice required in this class of cases is not to allege all the circumstances necessary to support the action. It is not a pleading. It is sufficient if it gives the officers of the corporation a general description of the injury and of the time, place, and cause of its occurrence. Testing the notice by what it contains under the circumstances of this case, it states with required certainty a description of the place and cause of the plaintiff's injuries.

[3] It appears from the finding that the falling of this ventilator was not caused by reason of any outside force or the act of a stranger or by collision with any object from the inside or outside of the car. Shortly before the accident, it was opened by one of the two conductors in charge of the car. The plaintiff at the time she was injured was in a seat directly beneath the ventilator. The exact cause of the fall of the ventilator was not directly shown in the evidence. It was so constructed that it could not have fallen from its place if the fixtures and fastenings had been in proper condition, and if it had been properly cared for at the time it fell. Neither of the conductors in charge of the car at the time of the accident were called as witnesses, and no explanation as to the cause of the accident was offered by the defendant. The court has found that upon these facts the plain-

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tiff was entitled to recovery. If this conclusion were justified, the judgment cannot be disturbed.

[4] This court in substance has said: Carriers of passengers are not insurers of their safety, but the law imposes upon them the duty to exercise the highest practical degree of human skill to carry the passengers in safety. *Murray v. Lehigh Valley R. Co.*, 66 Conn. 512, 518, 519, 34 Atl. 506, 507, 32 L. R. A. 539. "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." *Breen v. N. Y. Central R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450. While it was necessary for the plaintiff to affirmatively establish the alleged negligence on the part of the defendant either in the condition or in the operation, or in the inspection of its car, it was not necessary that she should prove either the specific defect in the ventilator or the particular act of misconduct in its management or inspection which constituted the negligence causing the injury complained of. It was sufficient if she proved facts from which the trial court might fairly infer that the ventilator was either defective in its construction, or was negligently cared for or inspected. *Griffen v. Manice*, 166 N. Y. 188, 196, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Whitney v. Boston Elevated Railway Co.*, 208 Mass. 115, 117, 94 N. E. 254. The plaintiff was a passenger on the car of the defendant company. She was entitled to be carried in safety, and it was the duty of the defendant to exercise a high degree of care to safely carry her while she remained in its car. In the order of common events, an accident like the one under consideration could not have happened. It is plain that it could not have occurred if the transom had been in proper condition and properly cared for. Just before the ventilator fell it was opened by a conductor. In the absence of any explanation upon the part of the defendant, the court below was clearly justified in inferring that the negligence complained of was the cause of the accident.

It was not necessary that the evidence should show that it was impossible that there should be any other cause. It was sufficient if it reasonably satisfied the trial court that there was none.

There is no error. The other Judges concurred.

ST. LOUIS, I. M. & S. RY. CO. *v.* HUTCHINSON *et al.*

(Supreme Court of Arkansas, Jan. 1, 1912.)

[142 S. W. Rep. 527.]

Carriers—Passengers—Action for Death—Burden of Proof.*—In an action for death of a passenger struck by the train on which he was about to take passage, instructions that a preponderance of the evidence showing that he was killed by defendant's train would make a *prima facie* case of negligence, and to escape liability the burden was on defendant to show by a preponderance of the evidence that it was not negligent or that decedent was guilty of contributory negligence; that the burden was on defendant to show by preponderance of all the evidence that decedent was guilty of contributory negligence; and that defendant was not bound to prove contributory negligence if it appeared from plaintiff's evidence—together, correctly stated the rule as to burden of proof as to contributory negligence.

Carriers—Passengers—Existence or Relation.†—One killed by a train at a station was a passenger, and not a trespasser, where he was starting to board a train with a ticket already procured.

*For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the mere fact that a passenger is injured, see first foot-note of preceding case.

For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a passenger is injured, see last paragraph of second foot-note of *Parker v. Boston & M. R. R.* (Vt.), 41 R. R. R. 153, 64 Am. & Eng. R. Cas., N. S., 153; last foot-note of *Pittsburg, etc., Ry. Co. v. Higgs* (Ind.), 24 R. R. R. 201, 47 Am. & Eng. R. Cas., N. S., 201, where all those preceding it are collected.

For the authorities in this series on the subject of the burden of proving contributory negligence in actions for injuries to passengers, see first foot-note of *Taillon v. Mears* (Mont.), 10 R. R. R. 516, 33 Am. & Eng. R. Cas., N. S., 516.

†See first paragraph of last foot-note of *Lugner v. Milwaukee, Elect. etc., Co.* (Wis.), 41 R. R. R. 186, 64 Am. & Eng. R. Cas., N. S., 186; third foot-note of *Roberts v. Atlantic C. L. R. Co.* (N. Car.), 40 R. R. R. 688, 63 Am. & Eng. R. Cas., N. S., 688; last foot-note of *Pennsylvania R. Co. v. Stockton* (C. C. A.), 40 R. R. R. 542, 63 Am. & Eng. R. Cas., N. S., 542; *Atlantic City R. Co. v. Clegg* (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; foot-note of *Mitchell v. Augusta, etc., Ry. Co.* (S. Car.), 39 R. R. R. 154, 62 Am. & Eng. R. Cas., N. S., 154; *Messenger v. Valley City St., etc., Ry. Co.* (N. Dak.), 39 R. R. R. 127, 62 Am. & Eng. R. Cas., N. S., 127; first foot-note of *Payne v. Springfield St. Ry. Co.* (Mass.), 33 R. R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186; first foot-note of *Lockwood v. Boston Elev. Ry. Co.* (Mass.), 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395.

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Carriers—Passengers—Duty of Railway Companies.†—A railway company must anticipate the presence of prospective passengers upon its station premises, when a train is arriving, and use ordinary care for their safety.

Carriers—Passengers—Contributory Negligence.§—A railway passenger, who is about to board a train, must use ordinary care for his own safety, to avoid being injured by an approaching train.

Carriers—Boarding Passengers—Care Required.§—A passenger in crossing a track to board a train need not use as much care for his own safety as a traveler at a highway crossing.

Appeal and Error—Harmless Error—Instructions.—A railroad company, sued for death of a passenger while crossing a track to board his train, cannot complain of an instruction requiring him to have used as much care for his own safety as is required of a traveler at a highway crossing.

Negligence—Contributory Negligence—Jury Question.—Contributory negligence is a jury question, where different minds might draw different conclusions as to its existence.

Carriers—Passengers — Death — Contributory Negligence — Jury Question.—Whether a passenger while crossing a track to board his train was guilty of contributory negligence held, under the evidence, a jury question.

Death—Damages—Evidence—Admissibility.—On an issue of the damages sustained by negligent death of plaintiffs' husband and father, it was proper to admit testimony of an adult son that he knew his father's business and of his contributions to the family, and that the contributions would amount to a specified sum, and to admit testimony of another witness that he knew the family, had boarded with them, and that decedent's average yearly contribution to the family, exclusive of personal expenses, would amount to from \$900 to \$1,000, and to permit another witness to state that he knew

†For the authorities in this series on the subject of the duties and liabilities of a railroad company with respect to its passengers struck by trains or street cars while crossing tracks between depots or other stopping places and their respective trains or cars, see first paragraph of first foot-note of *Creamer v. Louisville Ry. Co.* (Ky.), 40 R. R. R. 62, 63 Am. & Eng. R. Cas., N. S., 62; second head-note of *Washington, etc., Ry. Co. v. Vaughan* (Va.), 39 R. R. R. 444, 62 Am. & Eng. R. Cas., N. S., 444; *Atlantic City R. Co. v. Clegg* (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372; second foot-note of *Columbus Ry. Co. v. Asbell* (Ga.), 38 R. R. R. 22, 61 Am. & Eng. R. Cas., N. S., 22; second foot-note of *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487.

§For the authorities in this series on the subject of the contributory negligence of passengers in crossing tracks between depots and their trains, see foot-note of *Hall v. Southern Ry. Co.* (S. Car.), 40 R. R. R. 597, 63 Am. & Eng. R. Cas., N. S., 597; second foot-note of *Washington, etc., Ry. Co. v. Vaughan* (Va.), 39 R. R. R. 444, 62 Am. & Eng. R. Cas., N. S., 444; *Atlantic City R. Co. v. Clegg* (C. C. A.), 39 R. R. R. 372, 62 Am. & Eng. R. Cas., N. S., 372.

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the family, and that decedent was industrious, economical, and cared for his family.

Appeal and Error—Harmless Error—Admission of Evidence.—In an action for negligent death, any error in permitting a witness to testify that the present value of an annuity of the amount it was supposed decedent would have contributed to plaintiff's support was \$17,000 was harmless, where the jury returned a verdict for \$4,500.

Pleading—Cure of Defects.—In an action for negligent death, allegations in the complaint that decedent's widow and all his children were parties, and proof that no personal representatives had been appointed, and that all the heirs were parties, supplied any defect through the complainant's failure to allege that there was no personal representative.

Death—Damages—Excessiveness.—\$4,500 was not excessive recovery by a widow and three children who were 4, 6, and 11 years old, respectively, for negligent death of decedent, who was 44 years old, in good health, and industrious, economical, kind to his family, solicitous about the education of his children, and who had contributed from \$900 to \$1,000 a year for the family's support.

Appeal and Error—Harmless Error—Form of Verdict.—All persons concerned in the negligent death for which plaintiff sued having been made parties, defendant cannot complain that the verdict did not apportion the recovery among them; defendant being protected in the payment of the judgment.

Appeal from Circuit Court, Independence County; R. E. Jeffery, Judge.

Action by Mrs. T. Hutchinson and others against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

This suit was brought by Mrs. T. Hutchinson, for herself, as widow of the deceased and as next friend for the appellees, his children and heirs, for damages for the wrongful death of the deceased, alleged to have been caused by the negligence of the railway company.

It is alleged: That deceased resided in Newark and purchased a round trip ticket from that station to Earnhardt; that, while he was waiting at Earnhardt to take passage on the passenger train due to arrive there about 6 o'clock p. m. going to Newport that he might return to his home, he was run over and killed by a through freight train. "That said freight train was running in the direction of Newport, Ark., and on said passenger train's time and at an unusual rate of speed. That it was running backwards and without any headlight. That the night was cloudy, raining, and very dark. That defendant's employees failed to keep a lookout on said train for persons and property or give any warning, either by bell, whistle, or otherwise, of the approach of said freight

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train. That there was no light of any kind at said station, and grounds were very dark. That said station is surrounded on three sides by high mountains, which make the station and grounds thereof become dark quicker than it would otherwise. That defendant had on said date of the killing permitted a long string of freight and box cars to remain on the said track, extending for several hundred feet at and near the main track where the passengers got off and on defendant's trains, and in a way and manner which obstructed the view and passage of passengers getting on and off said trains. That when deceased was undertaking to cross defendant's track for the purpose of immediately taking passage on defendant's passenger train, which was then due, to return home, he not knowing that said freight train was then approaching, and under and by virtue of the premises aforesaid he could not and did not observe its approach and was struck and killed within a few feet of the place in which he was to board his said passenger train by said through freight train. That said deceased was struck and killed through and by the carelessness and negligence of defendant's employees. And on account of the death of said deceased said plaintiffs state that they have been damaged in the sum of \$20,000."

The answer denied the allegations of the complaint and that plaintiffs had been injured in any amount; alleged that the death of Perry Hutchinson, their intestate, was caused and contributed to by his own negligence, and that same was caused and brought on by a risk which he voluntarily assumed.

The testimony tended to show that the deceased, after purchasing a round trip ticket, had gone, on the day of the injury, to Earnhardt, a flag station on defendant's line of railroad, near which was located a distillery, for the purpose of purchasing some whisky for Christmas. There was a passing track at this station, west of the main line, the distance between the centers of the two tracks being 13 feet, and between the inside rails 9 feet, and all the space between filled level and ballasted. Two dirt roads cross the main line. There was a water tank east of the main line, and 196 steps south of a road crossing of it, and from said tank to another crossing was 393 steps, and the main track was straight for 500 feet north of the water tank and half a mile south of it. Freight cars were standing on the passing track, and somewhere south of the water tank there was a cut or opening of about a car length left between said cars. Immediately west of the passing track and on the edge of the right of way were three box cars on the ground, used as section houses, and where some of the section hands lived, two of them south, and the other, the largest and longest box car, used as a dining car, was north of this cut or opening between the cars on said passing track, which were between them and the main line, extending probably 150 feet to-

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wards the water tank, and extended north. The whisky warehouse was south of said cut or opening and between the right of way and the river. The place for passengers to take the trains going south was north of the water tank, at which the trains were accustomed to stop, and the testimony is conflicting as to which side of the track was treated as the station, and there was no platform there.

The day of the injury was a cold, bleak, cloudy one, and there was no depot building, nor any provision for the protection of passengers from the weather. The deceased and others had been to the warehouse and in the box cars used by the sectionmen, had eaten dinner in the long box car, and the deceased had taken a few drinks, had a bottle of whisky, and had been treating some of the men in said cars. The passenger train from the north, going towards Batesville, and upon which the deceased expected to return home, was due at 5:50 p. m., and was a few minutes late. About 6 o'clock, Hutchinson and his companion, who were waiting in the middle box car used as a section house immediately south of the cut or opening between the cars upon the siding, heard a train whistle, and one of the sectionmen said, "There is your train." They immediately left the box car, and, shortly the injury occurred, as the witness, James Langston, who was with him, testified: "We came out of the door of the middle box car, came around until we got to the side track, and walked between the cars, and could see as we went over there, continuously, the water tank. Hutchinson was ahead of me 10 or 12 feet when we got to the string of box cars, and just about the time I turned he said, 'Let's get across the track.' He was in a fast walk or run, and I heard the noise of the train, and I just threw my eyes on Hutchinson, and they were so close on him that I couldn't tell whether he got across, but I rather thought he did. It was dark at that time. I could see all of the water tank, and there was no obstruction between me and the water tank, except the train that was coming there. I was going onto the side track and threw my eyes from the track, and then looked again to see where he was, and they were so close together that I couldn't tell whether he made it across or not. When he spoke to me, he must have been something like on the main track, because when he spoke the noise of the train drew my attention. When he finished talking and I heard the noise of the train, the train was in the way, and I didn't see Hutchinson struck. I checked right on the side track when I first heard the noise of the train and saw the bulk of the train. I looked as soon as I could while crossing the side track. When he (Hutchinson) said this and I heard the train, I was right at the north end of the box car. Before that time I didn't see any train approaching, didn't hear the bell ringing or the whistle blown, or escaping steam, and didn't hear the train before the moment he spoke to me and said, 'Let's get across the track.' "

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The train that killed deceased was a freight train, an engine and caboose, the engine running backwards, and the evidence was conflicting as to whether there was a light upon the front end of it or not; some of the witnesses testifying there was none, while the railroad employees said there was a lantern hanging over the end of the tender, which was in front. A strong wind was blowing towards the approaching train, which was making very little noise and was running 10 to 15 miles an hour, according to the statement of the conductor, who also said it was dark when he passed Earnhardt, while other witnesses testified that it was going all the way up to 35 miles an hour. None of the employees on the train saw deceased and did not know of the injury until they reached Batesville. The passenger train stopped at the water tank for water and to take on passengers, as was the custom, and it was the understanding of the deceased that it would do so. The water tank was north of the cut or opening between the freight cars on the side track between which and it deceased was killed, but how far the evidence does not disclose. There was room between the main line and the box cars on the side track for a person to walk, and deceased could have remained upon that side of the main line and should have done so, according to the railroad employees, to have boarded the train at the proper place.

There was testimony as to the earning capacity of the deceased, and his treatment of his family, and the amount contributed to their support. The court then instructed the jury, gave 5 of the 23 instructions asked by the defendant, modified 2 others and gave them as modified, and gave 3 instructions upon its own motion.

The jury returned the following verdict: "We, the jury, find for the plaintiff in the sum of \$1,500. And for the minor children the sum of \$3,000, making a total of the sum of \$4,500. S. A. Ruddell, Foreman." And from the judgment the defendant appealed.

W. E. Hemingway, E. B. Kinsworthy, Jas. H. Stevenson, and S. D. Campbell, for appellant.

S. A. Moore and Jno. W. & Jos. M. Stayton, for appellees.

KIRBY, J. (after stating the facts as above). It is contended that the verdict is not sustained by the testimony; that certain testimony was improperly admitted; that the court erred in giving instructions numbered 2, 3, and 4 at plaintiffs' request, in giving instruction numbered 1, on its own motion, in refusing to give appellant's instructions, as requested, and in modifying and giving, as modified, two of same. We do not propose to review appellant's numerous objections, nor set out all of the instructions given or refused, but will notice only such as are necessary to the decision herein.

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Appellant's instructions were requested upon the theory that the deceased was a simple trespasser upon its tracks, to whom it owed no duty, except not to injure him after his perilous position was discovered, and, since the undisputed testimony showed that the employees operating the train did not discover him at all, that it would not be liable.

[1] The first instruction complained of tells the jury that, if it finds from the preponderance of the evidence that deceased was killed by defendant's train, it makes a prima facie case of negligence against the defendant, and to escape liability "the burden is upon the defendant to show by a preponderance of the evidence, either that it was not guilty of negligence, or that the deceased was guilty of contributory negligence."

Instruction No. 3 reads: "The burden of proof is upon the defendant to show by a preponderance of the evidence in the whole case that the deceased was guilty of contributory negligence."

Instruction No. 22 given for the appellant reads: "The defendant is not required to make proof of contributory negligence on the part of deceased if such contributory negligence appears from the evidence brought forward by the plaintiff."

These instructions taken together give the correct rule as to the burden of proof upon the defense of contributory negligence, although it is generally better expressed in a different and the usual form, as said in the case of *Railway v. Brown*, 140 S. W. 284.

[2] As we understand it, the chief objection was to the giving of such instruction at all, it being contended by appellant that deceased was a trespasser, that no presumption of negligence arose against it for injuring him, and that the burden of proof was upon plaintiff to show that there was a discovery of his peril and negligence of the company in failing to avoid injury after such discovery; but we do not agree to this contention.

It is undisputed that deceased purchased a round trip ticket from his home, Newark, to Earnhardt, a flag station; that it was necessary for him to be at the station to return upon the passenger train due to arrive there at 5:50, which usually stopped at the tank to take water; that there was no place for passengers provided for by the company for the protection of passengers against the weather, and there was no place, other than the box cars where the section hands lived in which he took shelter, which could have been resorted to by such passengers for the purpose, except the whisky warehouse, south of the cut or opening between the freight cars on the passing track and still west of the box cars on the right of way, in which the sectionmen lived. Certainly a passenger who could not leave the station before the arrival of this expected train would not be required to stand all day unprotected in the cold, and necessarily he must resort to the only places avail-

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able for such protection and return to the station for the train in time to embark.

If deceased had gone to the whisky warehouse and remained there, he would have, in coming to the train, doubtless, passed through this same cut or opening between the cars on the passing track, which others were accustomed to use, and must have done so, unless he went around such cars, going to the north or south. It is also true that, after crossing the passing track, there was room between the cars standing on it north towards the water tank and the main track, for him to have safely gone to the place where he could have boarded the passenger train, without crossing the main track; but that fact was not easily ascertained in the night by a stranger to the place, and he came out of one of said section house box cars, the middle one, after the train had whistled for the road crossing north of the water tank, and one of the section hands had said, "There is your train," passed through the opening between the cars on the side track hurriedly, expecting that the passenger train would stop for passengers at the water tank, still north of him, as was the custom, and was run down and killed by the extra freight train running backwards, at from 12 to 35 miles an hour, after dark, and making very little noise, with no headlight, no light whatever, on the front end, according to some of the witnesses, and only a switchman's lantern, according to those of appellant. The evidence further was in conflict as to which side of the main track the station was on, the companion of deceased having testified that they debarked that morning on the east side, or the side to which he was attempting to cross when struck, and there was some testimony that deceased had been drinking during the day; but all who saw him testified that he was not drunk. There is some ground, however, for the contention that, if deceased had been in the exercise of reasonable care for his own safety, he might have seen or heard the approaching train in time to have avoided the injury, since his companion discovered it; but it is certainly true that he could not and would not have been injured at all, if it had been the passenger train, which he had the right to expect and did think it was, when attempting to reach the station to embark.

Under the circumstances, deceased was not a trespasser, and was, within the meaning of the law, a passenger, having started to the train with a ticket already procured, and being upon the company's premises in the immediate vicinity of the place for taking the train, with the intention to board it on the return trip home, when it stopped for passengers, and to take water at the tank.

"This relation arises not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course." *Railway v. Stepp*,

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164 Fed. 785, 90 C. C. A. 431, 22 L. R. A. (N. S.) 350; Metcalf's Adm'r *v.* Railway (Miss.) 52 South. 355, 28 L. R. A. (N. S.) 311; Railway *v.* Kilpatrick, 67 Ark. 53, 54 S. W. 971.

[3] A passenger has an invitation to come to the place of the stoppage of trains, and it is the duty of the railway company to anticipate the presence of persons about its stations when a train is arriving, and to exercise ordinary care for their protection and safety. Railway *v.* Woods, 96 Ark. 315, 131 S. W. 869, 33 L. R. A. (N. S.) 855; Railway *v.* Daniels, 96 Miss. 314, 50 South. 721, 27 L. R. A. (N. S.) 131; Brackett's Adm'r *v.* Railway (Ky.) 111 S. W. 710

[4] The court correctly declared the law to be that deceased was bound, also, to the exercise of ordinary or reasonable care, and if by the exercise of such care he could have seen the approaching cars in time to have avoided the injury to himself, and failed to do so, that no recovery could be had. It further told the jury, on appellant's request, that it was the duty of deceased to look and listen for approaching trains, and continue to keep a lookout and listen for such cars up to the time he reached the place at the main track where he was struck, and that plaintiff could not recover if he failed to do so, and that if he saw or heard, or by the exercise of reasonable care could have seen or heard, the approaching cars upon the main line in time to have avoided the injury, and failed to exercise such care, either by the failure to look, listen, or stop, if necessary, before going upon or near the main line, that the plaintiff could not recover.

[5, 6] The instructions given upon the court's own motion were also more favorable to the appellant than it was entitled to, all being given upon the theory that deceased was bound to the exercise of as much care in the crossing of this track at the time and place he attempted to cross it, as a traveler would be upon a highway at a crossing of the railroad track, which is not the correct rule. Railway *v.* Tomlinson, 69 Ark. 496, 64 S. W. 347. But appellant cannot complain that these instructions required a greater degree of care of deceased than he was held to by law.

In Railway *v.* Williams, 137 S. W. 830, the court said: "Where it is uncertain as to whether or not there was a possibility for a traveler to have been able to hear or see the approaching train, either because the evidence is conflicting, or because there is doubt as to the inference to be drawn from the facts proved, the question of contributory negligence is properly one to be submitted to the jury."

[7] It has long been settled law that: "Where the situation is such from which different minds might draw different conclusions as to whether, under the particular circumstances, the plaintiff was guilty of contributory negligence, the question is properly one of fact for the jury to determine." Railway *v.* Clayton, 133

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S. W. 1124; Railway Co. v. Sparks, 81 Ark. 187, 99 S. W. 73; Aluminum Co. v. Ramsey, 89 Ark. 523, 117 S. W. 568; Railway Co. v. Stacks, 134 S. W. 317; Railway Co. v. Hitt, 76 Ark. 227, 88 S. W. 911; Railway Co. v. Bratton, 85 Ark. 337, 108 S. W. 518.

[8] There can be no doubt that the question of contributory negligence on the part of deceased was one that should have been submitted to the jury, and the running of appellant's train backwards after dark, through this station, with no lights upon it, at a rate of speed of from 12 to 35 miles per hour, at a time when the passenger train that was accustomed to stop for passengers at the water tank before reaching the place of injury was due, was evidence of such negligence that the jury were warranted in finding that appellant failed to exercise that ordinary care for the protection of deceased that it was bound by law to use.

The objection to plaintiff's instruction numbered 4 is not well taken, for it does not, as contended, assume a fact as proved, which the evidence shows was not true, but, at most, allowed the jury, if it found that "the train was making no noise," to take that fact into consideration with the others included in the instruction, and all other facts and circumstances in evidence, in order to determine whether or not deceased acted as a reasonable, prudent person would have done in going upon the track as he did at the time of the injury, and a specific objection at the time would doubtless have resulted in it being conformed to appellant's view of the law.

Appellant's objection to the refusal of the court to give a great number of instructions asked by it, on the theory that deceased was a trespasser upon its tracks at the time of the injury, is met by the view already announced herein that the deceased was not a trespasser, and the instructions were therefore not applicable to the case, and the court committed no error in refusing to give them.

[9] It is next contended that the court erred in admitting the testimony of certain witnesses as to the earning capacity of deceased and the testimony of an insurance agent, relative to the present value of an annuity of \$25,000; it being assumed that deceased's total contribution to his family during the remainder of his life expectancy would have amounted to that sum. An adult son of the deceased testified that he was familiar with his father's business and the contributions made to his family, and, after deducting an amount that would represent his personal expenses, that his net earnings and contributions to the family would be \$900 to \$1,000, and he later stated, without objection, that his father would contribute between \$900 and \$1,000 to the support of his family, but that \$150 should be deducted from that sum as his personal expenses.

Another witness testified that he was familiar with deceased and his family and had boarded with them and knew their man-

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ner of living; that he was a man of experience and, based upon this knowledge, he stated that he judged deceased's average yearly contributions to his family, exclusive of his personal expenses, would be between \$900 and \$1,000.

Another witness, Nat Wilson, testified that he was intimate with deceased and his family; that he was at his place frequently; that he was an industrious man, economical, and cared for his family. "Seemed attentive to his family in most every way."

The objection to the introduction of this testimony was general and presented no specific ground for its exclusion. The testimony was competent and relevant, and the court committed no error in its ruling in permitting its introduction. *Railway v. Sweet*, 60 Ark. 550, 31 S. W. 571.

[10] If the testimony of the insurance agent that the present value of an annuity of \$25,000, the sum it was supposed deceased would have contributed to his family, was \$17,000, was not competent, its admission was not prejudicial, since the jury evidently disregarded it entirely and fixed the whole damages at the sum of \$4,500.

Certain remarks of counsel for appellees in the closing argument were objected to and are assigned as error here; but such of them as were open to objection were withdrawn, and the others did not transcend the scope of legitimate discussion in the fair presentation of the case to the jury. The last assignment is that the court erred in rendering judgment on the verdict, which, it is also contended, is excessive. The verdict was, "We, the jury, find for the plaintiff in the sum of \$1,500 and for the minor children in the sum of \$3,000, making a total of \$4,500."

[11] This suit was brought by the widow and heirs of the deceased for damages for his wrongful death as authorized by section 6290 of Kirby's Digest; there being no administrator of his estate appointed. It is true that the complaint does not allege that there was no personal representative of the deceased; but it shows that the widow and all his children were parties, and the proof shows that no personal representative had been appointed, and that all the heirs of the deceased were parties, which supplied any defects in the averments of the complaint, and such suit could be maintained by them. *Railway v. Harper*, 44 Ark. 524; *Healey v. Connor*, 40 Ark. 352; *Railway v. Watson*, 134 S. W. 949.

It is also true that said section provides: "The amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they may deem a fair and just com-

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pensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin, of such deceased person.”

[12] And appellant especially urges that the damages awarded the minor children by the verdict are excessive. Two of them were girls, 11 and 4 years old, respectively, and one, a boy, 6 years of age at the bringing of the suit. They were entitled to maintenance and support by their father, until their arrival at majority, and pecuniary damages for such loss as well as to any damage they may have suffered on account of the loss of education and training because of his death. The widow was likewise damaged to the amount deceased would reasonably have contributed to her support, during his and her life expectancy. Deceased was 44 years old, strong, in good health, industrious, and economical, with a life expectancy of more than 25 years, and was kind to his family and considerate of their interests, providing for them as well as a poor man could, solicitous about the education of his children, and contributing from \$900 to \$1,000 a year to their maintenance and support, at the time of his death, and, under the circumstances, we do not regard the verdict of \$4,500 as excessive, considered as an entire sum or separately, as awarded by the jury.

[13] Without regard to whether the amount should have been divided by the jury, appellant cannot complain that it was done, being concerned only with the payment, since all the persons who had a pecuniary interest arising out of the death of deceased were parties to the suit, and, without regard to their division of the damages, it will be protected in the payment of the judgment rendered.

Finding no reversible error in the case, the judgment is affirmed.

SOUTHERN RY. CO. *v.* BROOKS.

(Supreme Court of Tennessee, Dec. 18, 1911.)

[143 S. W. Rep. 62.]

Carriers—Carriage of Passengers—Duty of Carrier.*—It is the duty of a common carrier of passengers to exercise the highest degree of skill and care to prevent injury, though it is not an insurer.

Railroads—Injuries to Persons on Track—Statute.—Shannon's Code, §§ 1574-1576, requiring railroad companies to keep some person on their locomotives, who shall employ every possible means to stop the train and prevent an accident, and providing that, when required precautions have been observed, the company shall not be liable, is mandatory, and, unless observed, the railroad company is liable for all damages.

Carriers—Carriage of Passengers—Duty to Passengers.†—The duty of a railroad company to safely carry its passengers is paramount to all others, and is superior to the requirements of Shannon's Code, §§ 1574-1576, providing that, whenever any person or animal appears upon a track, every possible means must be employed to stop the train; but the statutory precautions, when human life is in danger, should be observed, unless they will result in serious injury to passengers, but a railroad company will not be liable for slight or even serious injuries to passengers, when they are jolted by the sudden stopping of the train to prevent killing a trespasser, or for injuring trespassers or trespassing animals, when they are run down under such circumstances that it would endanger the lives of passengers to stop the train.

Appeal from Circuit Court, Hamblen County; G. M. Henderson, Judge.

Action by R. H. Brooks against the Southern Railway Company. There was a judgment of the Court of Civil Appeals, reversing a judgment for plaintiff, and plaintiff brings certiorari. Judgment affirmed, and case remanded.

King & King and *W. N. Hickey*, for plaintiff.

Susong & Biddle, *McCanless & Coleman*, and *Holloway & Hickey*, for defendant.

*See last foot-note of second preceding case.

†For the authorities in this series on the subject of the liability of carriers for injuries to passengers from jerks or jolts of trains or cars, see second foot-note of *Louisville Ry. Co. v. Wilder* (Ky.), 41 R. R. R. 148, 64 Am. & Eng. R. Cas., N. S., 148; foot-note of *Work v. Boston, etc., Ry. Co.* (Mass.), 39 R. R. R. 452, 62 Am. & Eng. R. Cas., N. S., 452; fourth foot-note of *Florida Ry. Co. v. Dorsey* (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556.

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SHIELDS, C. J. This is an action to recover damages for personal injuries sustained by R. H. Brooks while a passenger upon one of the passenger trains of the Southern Railway Company. The accident occurred at a station of the railway company, while the train was moving at about two miles an hour and almost in the act of stopping, and resulted from the sudden application of the emergency brakes by the engineer, causing the entire train to lurch backward and recoil with unusual force and violence. The passengers for that station had been notified to disembark and were preparing to do so. Brooks had arisen from his seat, turned towards the rear of the coach, and was in the act of going back to assist his wife, who was also a passenger, and, when the brakes were applied, was thrown down and against a seat, sustaining serious and permanent personal injuries.

The railway company in its defense proved by the engineer in charge of the locomotive that the brakes were applied in order to prevent the striking and probable killing of a boy who suddenly appeared upon the track some ten feet ahead of the pilot and was crossing to the opposite side, angling towards the engine, in compliance with the statute requiring certain precautions to be observed by railroad companies to prevent injuries to persons and animals upon the road before an approaching train.

The trial judge charged the jury that it was the duty of the railway company to keep some one upon its locomotives always upon the lookout ahead, and, when any person, animal, or other obstruction appeared upon the road, to sound the alarm whistle, put down the brakes, and use every possible means to stop the train and prevent the accident; but, while this was true, it was also its duty to exercise the highest degree of care, skill, and foresight possible for the safety of its passengers, and that it was not required to observe the statutory precautions when it would endanger the lives or limbs of passengers. In effect, the jury was instructed that, where the duty to observe the statutory precautions conflicted with that to passengers, the latter must prevail and be discharged. The charge is quite lengthy; but, while not in the words of the trial judge, the above is the substance and effect of the instruction given to the jury upon this subject.

There was verdict and judgment in favor of the plaintiff below. The railway company carried the case to the Court of Civil Appeals, and there assigned as error, among other things, the instruction to the jury above stated, which assignment was sustained, and the case is now before us upon certiorari prosecuted by Brooks to reverse the judgment of that court.

[1] Railroad companies, as common carriers, undertake to safely carry and deliver their passengers at their destination. In the performance of this contract and obligation, it is their duty to exercise the highest practicable degree of care and skill, and

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for failure to do so they are liable in damages for all injuries sustained by passengers. They are not insurers of the safety of passengers, as they are of freight. Every one who travels on the conveyances of a common carrier assumes some risks, such as are necessarily incident to that mode of travel, and for an injury sustained without the fault or negligence of the carrier there is no remedy. Injuries caused by the ordinary and unavoidable jolts and jars of moving trains are within this class. This duty of carriers to their passengers must be strictly discharged, and generally an injury to a passenger raises a rebuttable presumption of negligence and liability.

[2] Railroad companies also owe duties to persons who may appear upon their road, or within striking distance of their trains. The statute (Shannon's Code, §§ 1574-1576) requires railroad companies to keep the engineer, fireman, or some other person upon their locomotives always upon the lookout ahead, and, when any person, animal, or other obstruction appears upon the road, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident, and provides that upon failure to observe these precautions the company shall be liable for all damages to person or property resulting from any accident or collision that may occur, and also, when such precautions are observed, that they shall not be responsible for such damages; the burden of proving the observance being upon the company. The provisions of this statute have been repeatedly held by this court to be imperative and mandatory, and to require absolute obedience. They must be complied with, regardless of whether it appears they are necessary or will be effective to prevent an accident. *Hill v. Railroad Co.*, 9 Heisk. 823; *Railway Co. v. Foster*, 88 Tenn. 679, 13 S. W. 694, 14 S. W. 428.

When the precautions are not observed, the company is liable for the damages resulting from a collision. *Rapid Transit Co. v. Walton*, 105 Tenn. 417, 58 S. W. 737. The several requirements of the statute, sounding the alarm whistle, putting down the brakes, and employing all possible means to stop the train and prevent an accident, are all imperative. They are not to be observed in the order stated in the statute, but the precaution or thing which under the facts of the particular case is most available or effective to avert a collision and prevent the injury must be done. *Railway Company v. Scott*, 87 Tenn. 501, 11 S. W. 317.

We have no case arising from an apparent conflict of these duties to passengers and persons upon the road where a passenger was injured. All our cases in any way involving the question here presented relate to injuries to persons or animals appearing upon the road before locomotives.

Routon v. Railroad Company, 1 Shan. Cas. 528, was an action

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to recover for a cow killed upon the track near a trestle, in which the engineer testified that it would have endangered the safety of the train to have reversed his engine at that particular place. In discussing the necessity of observing the statute this court said: "The law does not demand of a railroad company the sacrifice of human life, either the lives of its employees or of its passengers in order to save a mere article of property."

Railroad Company v. Troxlee, 1 Lea, 521, was an action to recover for a mule killed upon the road, where the engineer failed to reverse his engine because of danger, on account of the speed, of wrecking the train. In this case it is said: "The statutes made by the Legislature for the government of railroads in cases of this kind are quite stringent, and we think justly so; but it certainly was never intended by the lawmakers that anything should be required which would endanger the lives or limbs of persons upon the train."

The case of Railroad Co. v. Selcer, 7 Lea, 558, was also an action for a mule killed. The engineer testified that to have reversed the engine would have endangered his life and been very injurious to the engine. This court, in passing upon an error assigned for the failure of the trial judge to charge that upon the testimony of the engineer the company was excused from the observance of the statute, said that injury to the engine or machinery furnished no excuse, but in regard to the danger to the life of the engineer used this language:

"It has been repeatedly held by this court that if the train is moving at such speed, or if the circumstances of its situation are such, that it would endanger the lives of persons on the train, the engineer is not bound to reverse the engine, although by doing so the collision itself may have been avoided."

The case of Railroad v. Connor, 9 Heisk. 23, was an action to recover for the death of a child killed upon the road, in which it was insisted that the paramount duty of the company was to its passengers, and therefore observance of the statute where it would endanger their lives or limbs was not required. It is there said:

"We do not say that the means employed to stop the train should be such as would cause imminent risk and danger to the passengers; but a slight increase of the danger to the passengers would be no excuse for failing to follow the positive mandate of the statute. The facts of the case call for no further discussion of the question. There is no proof that any of the means usually employed to stop the train would be at great or imminent danger to passengers. It would not do to hold that employees running the train shall be allowed to excuse themselves from failing to comply with the positive requirements by the mere expression of an opinion that to do so would endanger the passengers. The

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nature and extent of that danger should, at least, be more clearly shown."

[3] The duty of railroad companies to safely carry and deliver their passengers is paramount to all others. They contract to do this, and public policy demands and requires a strict performance of the terms of the contract. This was so by the common law in force long before the enactment of the statute, and it was not the intention of the Legislature to modify or abrogate the duty in favor of trespassers. We are of the opinion, and hold, that the precautions prescribed should not be observed, when to do so would imminently imperil the lives or limbs of passengers and employees on the train. The object of the statute is primarily to protect human life, and to construe it otherwise than here done would in many cases defeat that object. But less than imminent danger of serious bodily injury or death to those on the train will not excuse observance of the precautions, especially when the life of one on the road is involved. In other words, the probability of slight injuries to passengers and employees, or even serious injuries growing out of unusual positions which they may at the time occupy, will not excuse observance of the statute for protection of the life of a trespasser. While not directly involved here, we do not think the safety of passengers should be jeopardized in any case to prevent injuries to animals upon the road.

Humanity and public policy require that the duties of railroad companies to their passengers and to persons upon their roads be reconciled as far as possible to do so. No hard and fast rule can be made applicable to all cases. Each case where conflict presents itself must be determined upon its own particular facts. Where compliance with any particular provision of the statute, under attending conditions and environments, such as the speed of the train, a steep descending grade, a trestle or bridge, or other circumstance of peculiar danger, will imperil the lives or limbs of passengers with reasonable certainty, it should not be done. But where the place of the impending collision is level, or the speed of the train reasonably slow, or other conditions exist from which no great danger to passengers will ordinarily follow, or can be anticipated with reasonable certainty, usual conditions being considered, the statute must be observed, especially in favor of human life.

And in the event of a collision in the case first stated there will be no liability for injuries done persons or property upon the road, and in the latter there will be none to passengers upon the train. Neither the common law nor the statute requires impossibilities of railroad companies, or makes them liable for damages for acts which they are required by law to do. Their agents in cases of this kind are compelled to determine their duty, and to decide between the conflicting interest of passengers and trespassers instantly and without reflection, in many cases a most

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difficult thing to do; and when this discretion is exercised upon reasonable grounds and in good faith, it must be considered, and is entitled to much weight in determining whether there was negligence, and consequent liability, upon the part of the company.

We do not think that the learned trial judge was as clear and accurate as he should have been in stating the conflicting duties of the company upon the facts of this case to the jury, and that the plaintiff in error was thereby prejudiced, and for this reason the judgment should be reversed, and the case remanded for a new trial.

Affirmed.

KELLOGG v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Essex, Nov. 29, 1911.)

[96 N. E. Rep. 525.]

Appeal and Error—Review—Proof and Variance—Questions Raised.—Where defendant raised no question of variance between the declaration and the evidence by its request, on which a verdict was ordered in its behalf, the question of variance, if any, was not reviewable; but the question was whether there was any evidence warranting a verdict for plaintiff.

Carriers—Passengers—Contributory Negligence.—Where a passenger, who passed out of the coach after the brakeman had announced the station and pushed back the door on a metal catch, was injured by the door closing without having been touched by any passenger, a finding that he exercised ordinary care was justified.

Carriers—Injuries to Passengers—Negligence—Evidence.*—Where a carrier used a metal catch to hold open the door of a coach while passengers alighted at stations, and a brakeman announced a station and pushed back the door on the catch, and while the car was at rest the door closed, injuring a passenger, and there was no unusual jolt or intervening cause which unloosed the door, the jury could find actionable negligence of the carrier, though the coach, when stopped, was inclined from the side on which the door was hinged.

Exceptions from Superior Court, Essex County; Frederick Lawton, Judge.

Action by Aden D. Kellogg against the Boston & Maine Rail-

*For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to the opening and closing of car doors, see first foot-note of *Kearney v. Oregon R. & Nav. Co. (Ore.)*, 41 R. R. R. 172, 64 Am. & Eng. R. Cas., N. S., 172.

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road. There was a verdict for defendant, and plaintiff brings exceptions. Sustained.

W. J. Corcoran and *M. F. Cunningham*, for plaintiff.

Henry F. Hurlburt and *Damon E. Hall*, for defendant.

BRALEY, J. [1] It is urged by the defendant that as the declaration contained no general allegation of negligence, but only the specific averment that the defendant provided an insufficient and improper door fastener, there was a fatal variance between the cause of action alleged and the proof. But no question of pleading was raised by the request on which a verdict was ordered in its behalf, and the question for decision is whether there was any evidence which would have warranted a verdict for the plaintiff. *Ridenour v. H. C. Dexter Chair Co.*, 209 Mass. 70, 78, 95 N. E. 409.

[2] The plaintiff was a passenger, and when the train came to a stop at the station where he was to alight, the brakeman or baggage master announced the station, opened and pushed back the door of the car upon the metal catch which closed, and should have held it securely in place. In passing out but one passenger, who did not touch the door, preceded him, and as he followed and stepped over the threshold, the door, although he did not come in contact with it, unclasped and closing caught and injured his hand. It would follow that the plaintiff was injured while taking his departure under conditions established by the carrier and had the right to assume that reasonable precautions had been taken to enable him to leave in safety, and, if the accident happened as described by him, a finding that he exercised ordinary care would have been justified. *Carroll v. Boston & Northern St. Ry.*, 186 Mass. 97, 71 N. E. 89.

[3] The defendant provided the device and used it while passengers were making their exit. The car was at rest, and there having been no unusual jolt or intervening cause ordinarily incident to this mode of travel which unloosed the door, the jury, judging from their common experience and knowledge, could have found that unless the catch was in some way defective it would have worked properly and the door would not have instantaneously closed. *Silverman v. Carr*, 200 Mass. 396, 398, 86 N. E. 898; *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, 574, 66 N. E. 421. But the defendant, relying on the plaintiff's evidence that when the car stopped it was somewhat inclined from the side on which the door was hinged, contends that this slight shifting of the center of gravity created an unusual strain sufficient of itself to explain the mechanical action of the catch.

Yet even then the sufficiency of the catch was a question of fact. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 536, 86 N. E. 793. The jury might have been satisfied that, if suitable, it would not have yielded to the strain, but still would have

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prevented the door from being easily moved. *Weinschenk v. N. Y., N. H. & H. R. R.*, 190 Mass. 250, 76 N. E. 662. The defendant moreover had the absolute control of the movement of its passenger trains. If it chose to stop them for the discharge of passengers, where, because of the physical character of the location of the tracks, a due regard for their safety required that when the train stopped and they were leaving the car the doors, when opened and held back, should be so confined as to prevent their unexpectedly closing, and it was a question of fact whether the accident would have happened if this duty had been properly performed. *Marshall v. Boston & Worcester St. Ry.*, 195 Mass. 284, 287, 81 N. E. 195.

We are unable for these reasons to distinguish in principle the case at bar from *Silva v. Boston & Maine Railroad*, 204 Mass. 63, 90 N. E. 547, where our previous decisions bearing upon the questions raised are collected and reviewed.

Exceptions sustained.

WEBBER *v.* OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Plymouth, Jan. 3, 1912.)

[97 N. E. Rep. 74.]

Appeal and Error—Findings—Conclusiveness.—The weight of the testimony and the credibility of witnesses are not reviewable on exceptions.

Appeal and Error—Harmless Error.—The refusal of a requested ruling upon the measure of damages in a personal injury action became immaterial, where it was found that no liability by defendant had been proved.

Carriers—Passengers—Injuries — Negligence — Res Ipsa Loquitur Doctrine.*—A jolt, which was sufficient to cause a street car passenger to be lifted from her seat and fall, and cause the forward part

*For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises for the fact that its passenger is injured, see foot-note of *Birmingham R., etc., Co. v. McCurdy* (Ala.), 41 R. R. R. 516, 64 Am. & Eng. R. Cas., N. S., 516; last foot-note of *LeDean v. Northern Pac. Ry. Co.* (Idaho), 41 R. R. R. 232, 64 Am. & Eng. R. Cas., N. S., 232; first foot-note of *McKittrick v. Greeville Tract. Co.* (S. Car.), 40 R. R. R. 147, 63 Am. & Eng. R. Cas., N. S., 147; second foot-note of *Parker v. Boston & M. R. R.* (Vt.), 41 R. R. R. 153, 64 Am. & Eng. R. Cas., N. S., 153; *McDonough v. Boston Elev. Ry. Co.* (Mass.), 40 R. R. R. 704, 63 Am. & Eng. R. Cas., N. S., 704; *Pittsburg, etc., Ry. Co. v. Grom* (Ky.), 39 R. R. R. 747, 62 Am. & Eng. R. Cas., N. S., 747; first foot-note of *John v. Northern Pac. Ry. Co.* (Mont.), 39 R. R. R. 484, 62 Am. & Eng. R. Cas., N. S., 484; second foot-note of *Sherman v. Southern Pac. Co.* (Nev.), 38 R. R. R. 407, 61 Am. & Eng. R. Cas., N. S., 407.

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of the car to rise up on one side, unexplained, is presumptive proof of negligence, not being an ordinary incident of street car travel.

Carriers—Passengers—Injuries—Burden of Proof.—If a street car company introduces evidence to show that it was not negligent in causing the car to be severely jolted injuring a passenger, the passenger still has the burden of proving negligence, though the jolt, unexplained, would be presumptive evidence of negligence.

Carriers—Passengers—Care Required.—A street car company is bound to exercise due care in transporting passengers.

Negligence—Contributory Negligence.†—That a street car passenger was suffering from physical conditions making her more susceptible to a jolt of the car would not wholly deprive her of a right to recover for injury resulting from the negligent jolting of the car.

Appeal and Error—Harmless Error—Instructions.—Plaintiffs were not harmed by a ruling, where previous rulings were decisive against their right to recover.

Exceptions from Superior Court, Plymouth County; Schofield, Judge.

Actions by Clara E. Webber, and by George M. Webber, against the Old Colony Street Railway Company. Verdicts for defendant, and plaintiffs excepted. Exceptions overruled.

These are two actions of tort by husband and wife respectively, growing out of the personal injuries alleged to have been received by the female plaintiff while a passenger on one of the defendant's cars, caused by a jolt while the car was in motion and the other by her husband for expenses of her illness and loss of her consortium.

R. W. Nutter and C. C. King, for plaintiffs.

Asa P. French and James S. Allen, Jr., for defendant.

BRALEY, J. The judge before whom these cases were tried without a jury having made certain findings of fact on which he ruled as matter of law, that the plaintiffs could not recover, they seek to have the findings set aside with the exception of those numbered two, three and four, and the rulings reversed. It may be, as the plaintiffs contend, that by refined yet clear discriminations a substantial cause of action which they believed had been established by the evidence as stated in the first four findings was overthrown. But the adverse conclusion, that upon all the evidence the jolt which caused the forward part of the car during the transit to rise upon one side, lifting Mrs. Webber from her seat, and causing her to fall back with "a hard thump," was not attributable to a defective condition of the car, or of the roadbed and track, or to any negligence in operating the car, not

†See last foot-note of *Southern Ry. Co. v. Miller* (Ky.), 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311.

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having been unwarranted cannot be set aside. [1] It is familiar law, that the weight of testimony, and the credibility of witnesses are not reviewable on exceptions. The plaintiff presented twelve requests for rulings which were refused. [2] It is manifest that the first two were properly denied, and while the twelfth relating to the measure of damages became immaterial under the eighth finding that no liability of the defendant had been proved, the remaining requests, except the eleventh, directed the attention of the court to the rule, that the plaintiff's evidence, which the findings show the judge believed, was sufficient proof of its liability. If the defendant had offered no evidence the requests would have been applicable, but evidently upon the testimony of its motor-man and conductor as stated in the fifth finding, the judge reached the conclusion as to the cause of the accident, which is set forth in the seventh finding. The determination of facts, is, however, interwoven in the seventh and eighth findings with the important ruling found in the sixth to which the plaintiffs excepted. The ruling if it rested only on the first four findings might be subject to the plaintiffs' criticism, that it went beyond the evidence. [3] A jolt even if the car is not derailed, but which was sufficient to cause a passenger to pass through Mrs. Webber's experience is not an ordinary incident of travel. *Work v. Boston Elev. Ry.*, 207 Mass. 447, 93 N. E. 693; *Nolan v. Newton St. Ry.*, 206 Mass. 384, 388, 92 N. E. 505. And its unexplained occurrence is presumptive proof of the carrier's negligence. *Egan v. Old Colony St. Ry.*, 195 Mass. 159, 161, 80 N. E. 696. [4] But where as in the case at bar the defendant introduces evidence not perhaps to account for the accident, but to show that it had not been negligent, the plaintiffs still had the burden of proof, which the judge finally decided had not been sustained. *Carroll v. Boston Elev. Ry.*, 200 Mass. 527, 534, 535, 536, 86 N. E. 793, and cases cited. The ruling given in the ninth paragraph, that "as matter of law * * * where a passenger in an action against the carrier relies upon a personal injury as the result of a jolt, it is not enough to prove a jolt from which the injury resulted in fact, even though the jolt can be described as unusual or extraordinary, but it is necessary to prove that the jolt was such that it would have caused, or was sufficient to cause actionable injury to a passenger in normal health in the same situation" was incorrect, and the plaintiffs' eleventh request in substance should have been given. [5, 6] The defendant was bound to exercise due care in the transportation of those who had been accepted as passengers, and if she was found to have been suffering from physical conditions making her more susceptible to the particular form of injury, shown by the evidence, this fact did not deprive her of all damages caused by the fall. *Coleman v. N. Y. & N. H. R. R.*, 106 Mass. 160; *Derry v. Flitner*, 118 Mass. 131; *Turner v. Boston & Maine R. R.*, 158 Mass. 261, 266, 33 N. E. 520; *Spade v. Lynn*

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& Boston R. R., 172 Mass. 488, 491, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; Sullivan *v.* Marin, 175 Mass. 422, 56 N. E. 600; Steverman *v.* Boston Elevated Ry., 205 Mass. 508, 513, 91 N. E. 919; Stynes *v.* Boston Elev. Ry., 206 Mass. 75, 91 N. E. 998, 30 L. R. A. (N. S.), 737; Pearson *v.* Duane, 4 Wall. 605, 18 L. Ed. 447; Hannibal & St. Joseph R. R. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; 13 Cyc. 31, and cases cited in note 78. See, also, Connors *v.* Cunard Steamship Co., 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.), 171, 134 Am. St. Rep. 662. [7] But the plaintiffs were not harmed by this ruling as the previous findings and rulings were decisive of their right to recover. American Malting Co. *v.* Souther Brewing Co., 194 Mass. 89, 97, 80 N. E. 526.

Exceptions overruled.

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(Supreme Court of South Dakota, Dec. 11, 1911.)

[133 N. W. Rep. 696.]

Appeal and Error—Effect of Failure to Appeal.—In an action by a passenger for personal injuries received in attempting to board a street car, defendant moved for a new trial after an adverse verdict on the ground that there was not sufficient evidence of negligence, and that the evidence showed that the injury was the result of plaintiff's attempt to board the moving car, the risk of which he assumed, or of his own negligence, for which defendant was not liable. The motion was granted on the express ground that the evidence was not sufficient to show negligence. Plaintiff appealed from such order, but defendant did not. Held, that defendant must be presumed to have acquiesced in the decision of the court, and cannot urge on appeal that plaintiff was guilty of contributory negligence or assumed the risk.

Carriers—Carriage of Passengers—Actions—Evidence.—In an action by one injured in attempting to board a street car, evidence held insufficient to show negligence on the part of the street car company.

Negligence—Pleading and Proof.—In an action for personal injuries caused by negligence, the negligence alleged must be connected with the injury sustained.

Carriers—Actions—Evidence—Negligence.—The mere coincidence of a sudden lurch of a car and the injury of plaintiff who was attempting to board it will not warrant an inference of negligence on the part of those managing the car.

Carriers—Actions—Evidence—Negligence.*—In the absence of a

*See first foot-note of preceding case.

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statute making proof of death or injury prima facie evidence of negligence on the part of a carrier, proof of the injury alone will not sustain a recovery.

Appeal from Circuit Court, Minnehaha County; Joseph W. Jones, Judge.

Action by S. H. Wright against the Sioux Falls Traction System. From an order granting defendant a new trial, plaintiff appeals. Order affirmed.

Sam H. Wright, for appellant.

Boyce & Warren, for respondent.

SMITH, P. J. Appeal from an order of the circuit court of Minnehaha county setting aside a verdict and judgment for plaintiff, and granting a new trial, in an action for personal injuries.

[1] The order granting the new trial is expressly limited to the ground "that the evidence was not sufficient to raise the inference of negligence on the part of the defendant or its agents or servants, and for that reason defendant's motion for a direction of a verdict should have been granted." The motion for a new trial was upon two grounds: "First. There was not sufficient evidence of any negligence on the part of defendant which contributed to plaintiff's injury or which was the proximate cause of the injury. Second. The evidence shows that the injury was the result of the plaintiff's attempt to board the moving car, the risk of which the plaintiff assumed, or of his own negligence, for which defendant is not liable." In its answer the defendant pleads plaintiff's contributory negligence and assumption of risk in attempting to board plaintiff's car while the same was in motion and before it had come to a stop, and without having signaled defendant to stop the car or having indicated to the defendant that he desired to take passage, and, but for plaintiff's negligence, said accident would not have happened, and plaintiff would have received no injury, and that, by attempting to board defendant's car while the same was in motion and at the point alleged in plaintiff's complaint, he assumed the risk of any injury which might result under the conditions existing at that point. The order granting a new trial having been based upon one specific ground, namely, "that the evidence was not sufficient to show negligence on the part of defendant or its agents or servants, and for that reason a motion for direction of the verdict should have been sustained," is equivalent to a denial of defendant's motion for a new trial in so far as the same was based upon the ground of contributory negligence or assumption of risk. To that extent the defendant must be presumed to have acquiesced in the decision of the court, and cannot urge upon this appeal that plaintiff was guilty of contributory negligence, or that plaintiff assumed

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the risk of injury under conditions existing at the time of the accident.

[2] The only question for consideration is whether the evidence offered by plaintiff is sufficient to sustain an inference of negligence on the part of the defendant company. The defendant owned and operated an electric car line in the city of Sioux Falls, along Summit avenue, which crosses a viaduct over the Omaha Railroad. The street railway track runs north and south, and the Omaha road passing under the viaduct runs east and west. From the plat contained in the record it appears that the approach to the viaduct from the south is about 26 feet long, and the approach from the north is 28 feet, and that 54 feet across the top of the viaduct is perfectly level and covered with planking. At the south end of the approach to the viaduct the planking on the street is one foot and seven inches lower than the car rails. Over the level portion of the viaduct the rails are 5 inches above the plank for a distance of 54 feet, and at the north end of the approach the rails are 10 inches above the plank. The viaduct itself is considerably higher than the street, which rises rapidly toward the viaduct in both directions. There are railings on both the east and west ends, crossing the viaduct, and a walk on each side next the railings 3 or 4 feet wide, and a step from the walk of 2 or 3 inches, to the plank covering the viaduct.

The allegation in the complaint of negligence on the part of defendant is as follows: "That the said negligence of defendant, its agents, servants, and employees consisted in their failure to provide vehicles and other appliances necessary and safe for the purpose for which the same were then and there being used, in not having properly and safely protected the approach to the point of taking passage upon and alighting from the cars of the defendant at said point, there being no raising of the surface of the track at said point so as to render the step and from said cars of a reasonable and safe height from the footing or standing of the embarking and alighting passengers, the rails at that point causing about six inches perpendicular rise without any reduction of such perpendicular condition, by filling in platforms or otherwise, as would bring the level of the embanking and alighting approach at said point to the conditions existing at all other places on the line of said defendant, * * * thereby augmenting and adding to the danger incident to taking passage upon and retiring from said cars at that point, and misleading passengers and persons intending to take passage upon and retiring from said cars, and this plaintiff was then and there misled by such unusual conditions, to undertake embarkation upon the car of said defendant. That said defendant, its agents, servants, and employees, were then and there careless and negligent in their manner of operating said car, in that they failed to in a safe and businesslike manner to propel, stop, and start the car on which this plaintiff then and

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there sought to take passage, and through the sudden, negligent and careless jerking this plaintiff from the bridge or ground where he was seeking to take passage as aforesaid, and in diverse other careless acts and conduct in manipulating, managing, and running said car. Three. That the immediate injury to this plaintiff was the sudden, forceful and precipitous jerking and throwing the right leg of plaintiff between the knee and ankle against the step of the car of the defendant at the usual place and point of taking on passengers."

After these allegations of negligence, the character and extent of the injury alleged to have been received by plaintiff and damage sustained are described. Plaintiff himself apparently was the only witness to what occurred at the time of the injury. He testified that he had to go one block from where he lived to reach the north end of the viaduct on the east side; that on the day of the accident, when he reached the viaduct, the car was coming from the south going north, but was not in sight. A little later he saw the car coming from the south going north. He was on the east side of the street car track at the time the car came in sight. The car stopped at the first street south of the viaduct, and he then walked up the street car track to the usual getting on and off place. He was standing about three feet from the track when the car came opposite. When the car got to where he was standing, and as it passed, he caught onto the uprights and endeavored to jump onto the car. The car had not stopped, but was going probably a mile and a half or two miles an hour. Simultaneously with his taking hold of the two uprights there was a sudden jerk and lurch. He then says: "I do not know from what source it emanated, but it jerked my feet abruptly from the bridge over the viaduct, and brought my right leg at this point about six inches below the knee in sharp contact with the car step. * * * At the time it struck me the position of my body was straight. I was looking west. I had hold of the uprights, and, when the step hit me, I realized at once I was hurt, and gave myself a sudden push, and caught on my feet. The acts were taking hold, the lurch, and my being struck, and turning loose, and struck on my feet. The occurrences were almost simultaneous and as near together as four things could happen. This lurch occurred, and then I struck the step, while one of my feet was on the floor of the viaduct. According to my best judgment, the car came to a stop not to exceed 20 feet from where I was standing, as I recollect it now, and before the car had gone down to the north end of the approach to the viaduct." Plaintiff does not testify that he signaled the car to stop, but on cross-examination stated he was unable to say whether he signaled it or not. Plaintiff further testified that he had been taking or getting off the car at the viaduct three or four or five times a week. There was no obstruction on the sidewalk or between plaintiff and the car. There was

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no particular point on the 54 feet across the level viaduct at which the car stopped. It was sometimes nearer one end and sometimes nearer the other end of the viaduct. Plaintiff selected a point to wait for the car about 20 feet, 6 or 7 steps, from the place where the car in fact stopped at the time of the accident. We are of opinion the lower court was right in holding the evidence insufficient to show negligence on the part of the defendant company or its employees. Plaintiff in his testimony does not claim that the height of the rails above the planking on the viaduct was in any way whatever, the cause of, or contributed to, the accident.

[3] It is elementary law that, in an action for negligence, some connection must be made to appear between the negligence alleged and the injury sustained. Plaintiff does not even claim in his evidence any such connection so far as the elevation of the rails is concerned. He alleges in the complaint that defendant company and its employees were negligent in starting and stopping the car. There was a total want of evidence to show such negligence. Plaintiff when offering himself as a passenger on the car as it approached the viaduct must have been plainly visible to the employees operating the car. That this is true was apparent from the fact that such employees stopped the car to enable plaintiff to take passage at a point within six or seven steps from the place he was standing when the car approached. Such employees had no occasion to believe, and no right to suppose, that plaintiff contemplated taking passage while the car was still moving.

[4] The coincidence of a sudden lurch of the car and the injury of plaintiff is not alone sufficient evidence from which to draw an inference of a negligent act on the part of the employees handling the car. The evidence does not disclose that the lurch was occasioned by the elevation of the rails, nor by any negligent or unusual act on the part of those handling the car. It is not shown that the car was stopped and suddenly started, or that the lurch was anything more than might be occasioned by the elasticity of the springs on which such cars rest, and which might be put in action by the application of the brakes or the attempt of the car to reach equilibrium on the level viaduct after an ascent of the approach to the viaduct. The only fact from which negligence, either on the part of the defendant company or of the plaintiff himself, could possibly be inferred, is that the plaintiff received an injury.

[5] In the absence of a statute making proof of death or of injury prima facie evidence of negligence on the part of the carrier, we are not aware that it has ever been held that proof of injury alone would be sufficient to sustain an action for negligence. The exact point is suggested by the language of this court in *Saunders v. C. & N. W. Ry. Co.*, 6 S. D. 40, 60 N. W. 148. The

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court said: "This does not pretend to be a statement of what did happen, but only illustrative of the effect of what happened. It would apparently have been so easy to have shown on the trial what did really happen to the train, if anything, and so have informed the court and jury whether the company was probably to blame or not, that there seems to be no good reason for supplying the omission by a presumption, and that, too, a presumption of negligence, where a presumption of nonnegligence would be equally consistent with the fact proved." The same thought is stated in *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985, where the English rule is stated and approved, as follows: "If, on the whole, it be left in doubt what the cause of the injury was, or if it may as well be attributable to perils of the sea as to negligence, plaintiff cannot recover * * * That the jury were to see clearly that the defendants were guilty of negligence before they could find a verdict against them, * * * negligence will not be presumed from the mere fact of accident, which is as consistent with the presumption that it was unavoidable as it is with negligence." In *McGann v. Boston Elevated Ry. Co.*, 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.), 506, 127 Am. St. Rep. 509, the court says: "A plaintiff does not make out a case by proving that an electric car gave a jerk or some motion, and that he was hurt. * * * The possibility of an electric car giving a jerk is an incident to travel which any passenger must expect. To make out a case of negligence on the part of the defendant in such a case, the plaintiff must go further, and introduce evidence that the jerk in question was due to a defect in the track or to negligence in the operation of the car." See *Monroe v. Metropolitan Street Ry. Co.*, 79 App. Div. 587, 80 N. Y. Supp. 177; *Byron v. Lynn & Boston Ry. Co.*, 177 Mass. 303, 58 N. E. 1015; *Timms v. Old Colony St. Ry. Co.*, 183 Mass. 193, 66 N. E. 797; *Boulfrois v. Union Traction Co.*, 210 Pa. 263, 59 Atl. 1007, 105 Am. St. Rep. 809, note 14, Am. Neg. Rep. 331. Respondent's contention that, even though negligence of the defendant company had been proved, the facts would not entitle plaintiff to recover for the reason that he assumed the risk, cannot avail him on this appeal. Assumption of risk as a defense in the action was expressly held not available to respondent as a ground for a new trial and it is immaterial whether the holding of the trial court was founded upon its inapplicability as a defense in an action for negligence where no relationship of employer and employee existed, or upon the view that the evidence itself did not establish the defense. This ruling was not appealed from by respondent, and cannot be considered on this appeal.

The order of the trial court granting a new trial is affirmed, and the cause remanded for further proceedings according to law.

OTTO *v.* MILWAUKEE NORTHERN RY. CO.

(Supreme Court of Wisconsin, Jan. 9, 1912.)

[134 N. W. Rep. 157.]

Carriers—Electric Railroad—Starting Cars.—Under the modern appliances with which electric cars are generally equipped, it is not necessary in the proper handling of such cars to start them violently with a jerk.

Trial—Instructions—Applicability to Evidence.—Where an electric car equipped with modern appliances which could be started without any jerk was in fact started so suddenly as to throw a seated person violently back, and endanger one who was on his feet from falling unless he led to something for support, and caused plaintiff to fall from the car as she was on the lower step, an instruction that the mere sudden starting of the car was not of itself sufficient proof of actionable negligence, but that there must be affirmative proof that the jerk was unusual, and that mere statements of witnesses that the start was violent or sudden is not sufficient, was properly refused as inapplicable.

Carriers—Persons Boarding Car—Licensee.*—A person boarding an electric car to see relatives and friends off and assist them if necessary in accordance with a common custom, is a licensee to whom the carrier is bound to exercise ordinary care.

Carriers—Injuries to Licensee—Person Boarding Car—Contributory Negligence.—Plaintiff accompanied her son and other members of a party to defendant's electric car station to assist them with their luggage. Plaintiff carried a basket in one hand and some baby clothes in the other, and, after the rest had boarded the car, plaintiff stepped on the first tread to enable her to place the basket and clothes on the platform, and as she was doing so, the conductor not being present to assist her or in sight of her location, the car, without any signal, suddenly started with a jerk, precipitating her to the ground and breaking her arm. Held, that plaintiff in stepping on the lower tread of the car under such circumstances, was not negligent as a matter of law.

Carriers—Injuries to Licensees—Sudden Starting of Car—Negligence.—Defendant was not excusable for suddenly starting a car while plaintiff was in such dangerous position thereon because defendant's servant had no reason to anticipate that she did not do so as a passenger, since if she had been a passenger the sudden starting of the car while she was so circumstanced would have indicated actionable negligence.

*See first foot-note of *McElvane v. Central of Georgia Ry. Co.* (Ala.), 40 R. R. R. 564, 63 Am. & Eng. R. Cas., N. S., 564; second head-note of *Union Depot & Ry. Co. v. Londoner* (Colo.), 40 R. R. R. 351, 63 Am. & Eng. R. Cas., N. S., 351.

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Carriers—Car Operatives—Care Required.†—A carrier operating electric cars is bound to use reasonable diligence to discover whether a person who has stepped on a car has mounted the platform or stepped to the ground, before starting the car.

Carriers—Licensees—Boarding Electric Cars—Incumbrances.—That a licensee while boarding the lower tread of an electric car had both hands filled with bundles, and therefore could not help or save herself in case her equilibrium was disturbed by a motion of the car or otherwise, did not indicate that she was negligent as a matter of law.

Carriers—Injury to Licensees—Rules.‡—In an action against an electric railroad company for injuries to a licensee by the sudden starting of a car as she was standing on the lower step, rules adopted by the carrier for the guidance of its servants, requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others, imposed a higher degree of care than was imposed by law and were therefore inapplicable.

Evidence—Relevancy—Conclusions.—In an action for injuries to a licensee by being thrown from an electric car, a physician who had reduced the fracture of plaintiff's arm should not have been allowed to testify that the fracture might have been caused by her falling from an electric car, such question not being a proper subject for expert testimony.

Appeal and Error—Review—Harmless Error—Evidence.—Where there was no question but that plaintiff's arm was broken by a fall from defendant's electric car as alleged, defendant was not prejudiced by the improper admission of the evidence of the physician who reduced the fracture, that it might have been caused by plaintiff falling from the car.

Carriers—Duty to Licensee—Perilous Situation—Knowledge.—Where a licensee on an electric car was thrown therefrom and injured by the sudden starting thereof, the fact that defendant's servants did not know of plaintiff's perilous situation or have such reasonable ground to know as to be chargeable therewith, did not displace the duty to use ordinary care for plaintiff's safety which defendant owed to plaintiff.

Trial—Personal Injuries—Instruction—Amount of Recovery.—In an action for injuries, an instruction that if plaintiff was entitled

†See last paragraph of foot-note of *Central Kentucky Traction Co. v. Combs* (Ky.), 41 R. R. R. 485, 64 Am. & Eng. R. Cas., N. S., 485; foot-note of *Formiller v. Detroit United Ry.* (Mich.), 40 R. R. R. 729, 63 Am. & Eng. R. Cas., N. S., 729.

‡For the authorities in this series on the subject of the care due trespassers and licensees on trains or street cars, see *Sessions v. Southern Pac. Co.* (Cal.), 41 R. R. R. 781, 64 Am. & Eng. R. Cas., N. S., 781; foot-note of *Fox v. Minneapolis, etc., Ry. Co.* (Minn.), 41 R. R. R. 176, 64 Am. & Eng. R. Cas., N. S., 176; last foot-note of *Lawrence v. Kaul Lumber Co.* (Ala.), 41 R. R. R. 141, 64 Am. & Eng. R. Cas., N. S., 141.

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to recover at all, her damages should be fixed at such a sum as to fully compensate her for all damages she sustained by the injury, not exceeding \$5,000, in amount, that being the amount prayed for in the complaint, was erroneous since such amount did not govern the amount of recovery, and the charge was liable to mislead the jury.

Trial—Verdict—Amount of Recovery.—In an action for personal injuries the jury is not governed by the amount demanded in the prayer of the complaint, but may give more or less, notwithstanding the prayer, as warranted by the evidence.

Husband and Wife—Married Women—Injuries—Loss of Earning Power.—Where plaintiff, a married woman, was injured by a fall from an electric car and her injuries were treated at the expense of her husband, she could not recover for loss of earning power or for the expense of obtaining the cure of injuries sustained.

Damages—Excessiveness—Personal Injuries.—Plaintiff, a married woman, 55 years old, was thrown from an electric car and sustained a fracture of the radius of the left arm near the wrist. It was treated promptly and scientifically at the cost of her husband, by a surgeon on six or seven occasions and ran the ordinary course of such an injury to a substantial recovery in a few weeks. There was evidence that plaintiff suffered pain, but no more or greater than would ordinarily be caused by a similar injury. Held, that since plaintiff was not entitled to recover for expense of restoration of the arm or reimbursement for lost earning power, a verdict allowing her \$2,000 was excessive and should be reduced to \$1,200.

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by Bertha Otto against the Milwaukee Northern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed conditionally.

Plaintiff accompanied her son, his wife and two children and the wife's sister, to assist them, particularly the wife and children, to take passage on defendant's car. All but plaintiff intended to board the first car going their way. She carried a basket in one hand and some baby clothes in the other. As a car was seen approaching she efficiently signaled it to stop. Upon the car coming to a stand the party proceeded to enter; the man carrying a grip, leading. When all were aboard but plaintiff, she stepped upon the first tread to enable her to place the basket and clothes on the platform. As she was in the act of doing, or had just done, so, the conductor not being present to assist or in sight from her location, so far as she observed the car, without any signal having been given, suddenly started with a jerk precipitating her to the ground, breaking her arm, and considerably disturbing other members of the party.

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The cause was submitted to the jury, resulting in a verdict, holding defendant liable for negligent breach of duty to plaintiff in starting the car in the manner and under the circumstances mentioned, causing injury to her without any efficient contributory fault, and assessing her damages at \$2,000. Judgment was rendered accordingly.

Flanders, Bottum, Fawsett & Bottum (James G. Flanders, of counsel), for appellant.

W. B. Rubin (H. B. Walmsley, of counsel), for respondent.

MARSHALL, J. (after stating the facts as above). This is not a case within the class illustrated by *Wickett v. Wis. Cent. Ry. Co.*, 142 Wis. 375, 125 N. W. 943, and the like, dealing with a situation created by a person entering a railroad car as a licensee to see another off on a journey, and the railroad company's servant, not knowing or having reasonable ground to anticipate the entry is with the intention of going back before the starting time, efficiently signals for the start, resulting in such person being injured in his effort to leave the car. Had respondent here reached the platform before the car started and then returned to the lower step and dropped from it by reason of the car suddenly starting, such cases might cut some figure.

Neither is the case before us within the class illustrated by *Boston Elev. Ry. Co. v. Smith*, 168 Fed. 628, 94 C. C. A. 84, 23 L. R. A. (N. S.), 890, and similar cases which deal with the situation of a person who has boarded a car to the platform, and the car is started with the usual disturbance so that before he has time to reach a seat he is injured by being thrown about somewhat.

Just as plainly this is not within the class illustrated by *Hill v. Ry. Co.*, 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.), 432, and the like dealing with a situation of a person who has boarded a car to see some one off and is injured in trying to leave on account of the car starting without previous signaling, as was customary, to give a person so circumstanced opportunity to return safely to the outside.

Independently of the particular location of respondent at the time the car started, precipitating her to the ground, the case is not within the class illustrated by *Boston Elev. R. Co. v. Smith*, *supra*, and the like, therein referred to, relied upon by counsel for respondent, dealing with ordinary reasonably necessary jerking of an electric car in starting; (1) because they have reference to the effect of such ordinary jerking after a person has reached the platform, whereas here the respondent was on the lower step of the car where a sudden start would naturally imperil one's safety; and, (2) because the evidence shows that there was something more than ordinary jerking. There was a violent start—one that disturbed, abnormally, passengers who were seated.

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[1] Moreover, while it may be that some years ago an electric car, ordinarily, when properly handled, started with a jerk so such movement was to be expected, that is not the case now, necessarily, since by use of modern improvements, with which the proof shows the car in question was equipped, no such violent movement of the car was necessary so far as the manipulation of the appliance itself was concerned.

[2] For the reason stated the instruction asked to the effect that the mere sudden starting of an electric car is not in itself sufficient proof of actionable negligence—that affirmative proof is necessary of an unusual jerk, and that mere statements of the witness that the start was violent or sudden is not sufficient, so far as good law, does not apply to the case. Here the proof was that the car could be started without any jerk, but was in fact started so suddenly as to throw a seated person violently back and endanger one who was on his feet of falling unless holding to something for support.

[3] There is little use in going further by way of reviewing cases cited by either side. It is doubtful if any of them throw any light on this case as regards similarity of facts, or in principle bear on it, except by way of illustrating and declaring what is freely conceded by respondent, that it is such common custom, submitted to by passenger transportation companies, for persons to board cars to see relatives and friends off, and assist them when necessary, as in this case, that in doing so they are licensees and entitled to be treated by those in charge of cars with ordinary care.

[4] Respondent was not guilty of any want of ordinary care, as matter of law, merely because she stepped upon the lower tread of the car. [5] Defendant is not excusable for starting the car while she was in that position because its servants had no reason to anticipate that she did not do so as a passenger. Had she been such, to have suddenly started the car while she was so circumstanced would, at the best for appellant, have admitted of a reasonable inference of want of due care, if those in charge of the car knew, or ought reasonably to have known of her situation.

[6] Obviously, it is the business of a railroad company to use reasonable diligence to discover whether a person who has stepped on a car has mounted the platform or stepped to the ground before starting. It seems there was room in the evidence for the jury to conclude that there was a fatal omission of defendant in that regard.

[7] True, respondent was badly incumbered, having neither hand free to help or save herself in case of her equilibrium being disturbed by a motion of the car or otherwise. But it cannot well be held that a person is guilty of a want of ordinary care, as matter of law, in stepping upon the lower tread of a car or proceeding to the platform with both hands engaged in carrying parcels.

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On the whole, it seems that there is no sound basis in the record for holding that the trial court was clearly wrong in submitting the question of actionable fault of appellant and that of contributory fault of respondent, to the jury.

[8] Complaint is made because the court admitted in evidence a rule of the company for the guidance of its servants, requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others. Obviously, that had nothing to do with the case. The law, not any rule of the company, was the test of defendant's duty. Moreover, no such duty as that indicated by the rule, is legally required as regards a mere licensee. Why the trial court permitted the introduction of a matter so very foreign to the case, is not perceived. Moreover, why the illegitimate character of the evidence was intensified by the court, upon objection being made, remarking: "I cannot see that that does anything more than declare what the law would declare, but I think I will overrule the objection to that." The jury may well have gotten therefrom the idea that the law required the high standard of care mentioned in the rule as regards the personal safety of a mere licensee like respondent, which, of course, is not the fact. The court evidently emerged from the delusion in that regard before the close of the trial, since we find the jury were very emphatically instructed that appellant owed the respondent the duty only of exercising ordinary care for her personal safety. Whether that wholly cured the error so as to render it nonprejudicial is not free from difficulty.

[9] Error is assigned because the court permitted a doctor, who attended respondent, when on the stand to give evidence as to the nature of her injury as he found it and the course and result of his treatment, to testify that the fracture of her arm might have been caused by her falling from a street car. No justification appears for allowing that. It was not a subject for expert evidence. [10] True, there was no question but that respondent's arm was broken by a fall from the car, as alleged; so the error was probably not harmful. But such error and others in this case, which are so plain that it seems they ought not to have occurred, lead us to remark that the beneficial policy established by the Code and so often vindicated by the court of disregarding as inconsequential, all errors which do not prejudicially affect the substantial rights of the adverse party, in that had they not occurred the result might, within reasonable probabilities, have been more favorable to him, should not lead to inattention at the trial and promote the commission of error. It should rather stimulate careful rather than inconsiderate administration.

Complaint is made because the jury were instructed, in effect, that the defendant owed respondent the duty of ordinary care. Why such complaint is made is not appreciated. Of course such duty was owing to respondent. [11] If defendant did not know

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of her perilous situation, or have such reasonable ground to know it as to be chargeable therewith, that merely bears on whether there was a breach of duty in starting the car. It does not displace the duty itself.

[12] Further complaint is made because the court instructed the jury that if plaintiff was entitled to recover at all, her damages should be fixed at such sum as to fully compensate her for all damages she sustained by the injury, not exceeding in amount the sum of \$5,000.

Why was such an instruction given? This court has, as counsel for appellant suggest, pretty plainly advised against such a practice. *Hupfer v. Nat. Distilling Co.*, 127 Wis. 306, 313, 106 N. W. 831. The law placed no such limit as a guide for the jury. The pleading placed no such limit. True, the prayer was for \$5,000, but that did not govern the amount of the recovery. [13] It might have been more if the evidence warranted it notwithstanding the prayer. Why refer to the matter at all, especially in such a case where the danger is ever present of overestimating reasonable recoverable damages? Often a jury award, in such a case, is reduced by the trial judge and by this court, and sometimes by the latter after a reduction in the initial jurisdiction, while necessity for disturbing the verdict because of inadequacy very seldom occurs.

Jurors are liable, unless carefully cautioned, to be moved by sympathy, and this is said in no spirit of criticism. The steadying hand of a thoughtful, practical, appreciative judicial head is no more needed in any field of trial work than that of such cases as this.

Why needlessly use language in charging a jury, which has been treated with disfavor here and is plainly liable to convey a false prejudicial notion? The jury might well have inferred they were at liberty on the evidence to place the damage as high as \$5,000, if they thought best. What other conclusion could they reasonably have come to? They must have thought that the limit of \$5,000 was mentioned for some purpose of an obligatory nature.

So far as the result of the trial was to find appellant guilty of actionable negligence, it is thought no clear prejudicial error occurred which was not cured before verdict.

[14] Turning to the amount of the damages, \$2,000, in view of the situation of respondent it looks large. The nature of the charge seems to account for it. She was a married woman about 55 years of age. Much evidence was elucidated going to show that she was incapacitated for work for a considerable period and that her ability in that regard had not been fully restored at the time of the trial. That evidence does not seem to have been produced merely to show infirmity in the arm with attendant pain, caused by the accident. It was not directed particularly to that but to the effect of the injury upon respondent's working power

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as if that were part of her loss. That may well have misled the jury, since such loss was not her's but her husband's. The jury were not carefully instructed so as to guard against danger from evidence of that kind, but rather the contrary, in being told that they would find for plaintiff full loss not to exceed \$5,000. True, the court instructed in general language not to include any element of lost earning power, but such element was not expressly excluded, so it is not certain that it was not included, as the jury understood the matter.

[15] The injury consisted of an ordinary fracture of the radius of the left arm near the wrist. It was treated promptly and scientifically, and, of course, at the cost of the husband. There is no definite evidence that there was any other injury than that mentioned. It was painful, but not unusually so. It ran the ordinary course of such an injury to a substantial recovery in a few weeks. She walked to the place where she was treated and returned without assistance. She was treated by a surgeon some 6 or 7 times. A careful scrutiny of the evidence fails to disclose anything indicating that the injury was attended with any very material special difficulty. It was ordinary of its kind. Reasonable compensation for suffering, past and future, so far as discovered by the jury to a reasonable certainty, was the utmost she was entitled to,—no pay for expense of restoration of the arm or reimbursement for lost earning power. Compensation upon the basis of a full equivalent in dollars for pain and suffering was impossible. An attempt to award it would have been unjust. *Guinard v. Knapp, Stout & Co. Company*, 95 Wis. 482, 490, 70 N. W. 671. The \$2,000 was equivalent to an annuity for the woman of about \$13 per month for life. We cannot escape the conclusion that had there not been unguarded language used the assessment might have been as low as \$1,200, and that an unprejudiced jury, properly instructed, in case of another trial might, within reasonable probabilities, assess as low a sum. It seems that to permit respondent to take judgment for any greater sum than that regardless of the wishes of appellant, would violate the right of trial by jury. *Rueping v. C. & N. W. R. Co.*, 123 Wis. 319, 101 N. W. 710; *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669.

The judgment is reversed, and the cause remanded with directions to allow plaintiff to take judgment for \$1,200 and costs, if she elects to do so by motion therein on notice to the opposite counsel within 60 days after the remittitur reaches the court below, and in case of such election not being so made then for a new trial.

RENAUD v. NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Worcester, Jan. 3, 1912.)

[97 N. E. Rep. 98.]

Carriers—Transportation of Passengers—Rules.*—A common carrier of passengers, both at common law and as expressly authorized by St. 1906, c. 463, pt. 2, § 181, may make reasonable rules to govern the conduct of its passengers.

Carriers—Transportation of Passengers—Duty to Transport.—A carrier's public duty to transport passengers is confined to those who are prepared to conduct themselves according to regulations reasonably necessary for the protection of passengers, and for the safe and convenient transaction of the carrier's business, in the light of its severe obligations.

Carriers—Transportation of Passengers—Regulations—Reasonableness.*—A carrier's regulation, forbidding passengers to ride in any baggage car, or on the platform or steps of any car, was reasonable.

Carriers—Injuries to Passengers—Violation of Rule.†—Where a passenger, with knowledge of the existence of a reasonable carrier's rule, violated it, and was injured, he could not recover, if his violation of the rule was a contributing cause of the injury.

Carriers—Uninclosed Platform—Injuries to Passengers—Assumed Risk.‡—A person, injured while riding on the uninclosed platform of a railroad train or other exposed position, assumes the risk of injury from such cause.

Carriers—Injury to Passengers—Disobedience of Rules.—No duty of care rests on the carrier toward a passenger who disobeys reasonable rules promulgated for his safety.

Carriers—Injuries to Passengers—Conduct of Servant—Rules.—Where a passenger is injured, and a carrier seeks to justify the conduct of its servants by rule, it is not necessary that notice of the rule be shown to have been given to the plaintiff.

Death—Death of Passenger—Contributory Negligence—Statutes.—St. 1906, c. 463, pt. 1, § 63, provides that, if a carrier, by reason of its negligence, or by reason of the unfitness or gross negligence of

*For the authorities in this series on the subject of the validity of a carrier of passenger's rules and regulations, see *Doherty v. Northern Pac. Ry. Co.*, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210; foot-note of *Martin v. Rhode Island Co. (R. I.)*, 39 R. R. R. 415, 62 Am. & Eng. R. Cas., N. S., 415; first foot-note of *Kyle v. Chicago, etc., Ry. Co. (C. C. A.)*, 39 R. R. R. 149, 62 Am. & Eng. R. Cas., N. S., 149.

†For the authorities in this series on the subject of the contributory negligence of passenger in violating the rules and regulations of the carrier, see last paragraph of first foot-note of *Birmingham, etc., Co. v. Girod (Ala.)*, 36 R. R. R. 727, 59 Am. & Eng. R. Cas., N. S., 727.

‡See (‡) on page 634.

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its agents or servants while engaged in its business, cause the death of a passenger, it shall be punished by a fine of not less than \$500 nor more than \$5,000, which shall be paid to the executor or administrator of the person killed; one-half to the use of the widow; one-half to the use of the children of the deceased, etc. Held, that an administrator of a person killed while traveling on a railroad train could recover under such act, though her intestate was not in the exercise of due care, provided he was a passenger.

Carriers—Injury to Passenger—Care Required—Rules.†—Since a carrier is held to the highest degree of care for the safety of passengers consistent with carrying on its business, the passengers, in order to be entitled to such care, are also bound to heed reasonable regulations made for their convenience or security.

Carriers—Transportation of Passengers—Regulations—Knowledge.†—A reasonable regulation adopted by a carrier for the safety of passengers, in order to be binding on a passenger, must have been brought to his knowledge, either expressly or by necessary implication.

Death—Death of Passengers—Violation of Rule.—Where a passenger, in violation of a rule plainly painted on the panel on the inside of the door on each car, forbidding passengers to ride on the platform or steps of the car, went on the lower step of the coach in which he was riding while the train was still in motion, and was thrown off and killed by the suction of a train passing at high speed on an adjoining track, the fact that he could not have recovered for an injury under those circumstances, because of his own negligence, had he lived, did not prevent his administrator from recovering for his death under St. 1906, c. 463, p. 1, § 63, providing a penalty to be recovered against a railroad company for causing the death of a passenger through negligence.

Carriers—Transportation of Passengers—Termination of Contract—Rules.—Where a passenger went to the lower step of the coach in which he was riding before the car stopped, in violation of a rule, but there was no evidence that notice had been given to him on former occasions that he would not be regarded as a passenger if he violated the rule, or that he knew that such was the penalty of violation, or that he avoided the carrier's servants, so that his conduct would be unobserved, and no notice could be given him, or that he was in a place where passengers might not go under proper conditions, his violation of the rule did not involve malicious conduct, moral turpitude, gross and willful disregard of the rights of others, or a plain surrender of his rights as a passenger, and therefore did not terminate the contract of carriage, and transform him into a bare licensee or trespasser.

Carriers—Passengers—Misconduct.—If, after express notice to a passenger of his violation of a carrier's reasonable rule, he does not

†See (†) on page 632.

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forthwith conform thereto, then his rights as a passenger cease, and he becomes a trespasser, and may be ejected, but until notice the relation of carrier and passenger continues.

Death—Death of Passenger—Rules—Evidence.—Where a passenger, in violation of a rule forbidding passengers to ride on the platform or steps of any car, went on the lower step of his car while the train was in motion, and was thrown off and killed by the suction created by a train passing at high speed on an adjoining track, and suit was brought to recover a penalty for his wrongful death, as authorized by St. 1906, c. 463, pt. 1, § 63, the carrier's rule was admissible, especially where plaintiff relied in part on the alleged gross negligence of defendant's conductor in failing to warn his intestate of the danger, and also the alleged negligence of the engineers in operating their trains as they did, under the circumstances.

Death—Transportation of Passengers—Duty of Conductor—Gross Negligence.†—Where a rule prohibiting passengers from riding on the platform or steps of a car was conspicuously posted, the conductor, being entitled to assume that passengers would obey the rules, and being under no obligation, in the exercise of ordinary care, to warn or otherwise care for passengers on the platform or steps while the train was in motion, was not guilty of gross negligence in failing to act on the theory that passengers would be negligent, so as to warrant recovery under St. 1906, c. 463, pt. 1, § 63, rendering a carrier liable for the death of a passenger resulting from gross negligence of its employees.

Death—Death of Passenger—Gross Negligence—Evidence—Rules.—Where a passenger, while standing on the steps of a coach, was thrown from the step by the suction created by a train passing at high speed on the adjoining track, and killed, a rule, conspicuously posted, prohibiting passengers from standing on the steps or platform of the cars, was admissible as bearing on the issue of gross negligence of the engineers of both trains in operating their trains, within St. 1906, c. 463, pt. 1, § 63, rendering a carrier liable for death of a passenger resulting from the gross negligence of its employees.

Death—Injuries to Passengers—Engineers—"Gross Negligence."—Failure on the part of a locomotive engineer to see when he ought to have seen, and when the consequences of such failure might result in the death of a human being, may be found to be "gross negligence," within St. 1906, c. 463, pt. 1, § 63, rendering a carrier liable for the death of a passenger resulting from the gross negligence of its employees.

Exceptions from Superior Court, Worcester County; Jabez Fox, Judge.

†See first foot-note of Louisville, etc., Ry. Co. v. Gregory's Adm'r (Ky.), 39 R. R. R. 382, 62 Am. & Eng. R. Cas., N. S., 382; first foot-note of Rager v. Pennsylvania R. Co. (Pa.), 39 R. R. R. 757, 62 Am. & Eng. R. Cas., N. S., 757.

Renaud *v.* New York, N. H. & H. R. Co

Action by Rose Renaud against the New York, New Haven & Hartford Railroad Company for the death of plaintiff's intestate, while a passenger on one of defendant's trains. Verdict for plaintiff, and defendant brings exceptions. Sustained.

See, also, 206 Mass. 557, 92 N. E. 710.

David L. & Thomas L. Walsh, for plaintiff.

Choate, Hall & Stewart, for defendant.

RUGG, C. J. This is an action under St. 1906, c. 463, pt. 1, § 63, to recover damages for the death of the plaintiff's intestate while a passenger. A reasonable inference was possible from one aspect of the evidence that the plaintiff's intestate leaving his seat in a moving train of the defendant upon which he was a passenger, went on the lower step of a car, and while the train was still in motion, was thrown off the step and killed through the suction created by a train passing at a high rate of speed on the next track. The defendant offered to prove that there was conspicuously painted, on the panel inside each door in the car in which the deceased was riding, this: "Regulation: New York, New Haven & Hartford Railroad Co.: Passengers are forbidden to ride in any baggage car or on the platform or steps of any car." The chief question is whether the exclusion of this evidence was error.

[1-7] A common carrier of passengers has a right inherent from the nature of its undertaking to make reasonable rules to govern the conduct of its passengers. *Commonwealth v. Power*, 7 Metc. 596-600, 41 Am. Dec. 465. Moreover, this right is expressly conferred by statute. St. 1906, c. 463, pt. 2, § 181. Its public duty requires a common carrier to transport only persons who are willing to regard such rules, and its invitation to become passengers is confined to those who are prepared to conduct themselves according to regulations reasonably necessary for the protection of passengers and for the safe and convenient transaction of the business of the carrier in the light of its severe obligations. *Webster v. Fitchburg Railroad*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521. There can be no doubt as to the reasonableness of the regulation offered in evidence. *Willis v. Lynn & Boston Railroad*, 129 Mass. 351; *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; *Cutts v. Boston Elevated Railway*, 202 Mass. 450, 89 N. E. 21, and cases cited at page 455. Violation of a reasonable rule with knowledge of its existence precludes recovery by the person whose violation was a contributing cause of his injury. *Twiss v. Boston Elevated Railway*, 208 Mass. 108, 94 N. E. 253, 32 L. R. A. (N. S.) 728; *Bromley v. New York, New Haven & Hartford R. R.* 193 Mass. 453, 79 N. E. 775; *Tompkins v. Boston Elevated Railway*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A. (N. S.) 1063, 131 Am. St. Rep. 392. It has been decided many times that a person in-

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jured while riding on the unenclosed platform of a railroad train or other exposed position assumes the risk of injury arising from such cause. See for example *Hickey v. Boston & Lowell Railroad*, 14 Allen, 429; *Fletcher v. Boston & Maine Railroad*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414. It has also been held that no duty of care rests on the carrier toward a passenger who disobeys the rules. *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207-219, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541. Where a railroad company seeks to justify the conduct of its servants by a rule, it is not necessary to show that notice of it was given to the plaintiff. *O'Neill v. Lynn & Boston Railroad*, 155 Mass. 371, 373, 29 N. E. 630. Commonly evidence of such a regulation as this has been admitted. *O'Brien v. Boston & Worcester Railroad*, 15 Gray, 20, 77 Am. Dec. 347; *O'Loughlin v. Boston & Maine Railroad*, 164 Mass. 139, 41 N. E. 121; *Dixon v. New England Railroad*, 179 Mass. 242, 246, 60 N. E. 581. But these decisions are not decisive in the case at bar, for the crucial point is whether the decedent was a passenger at the time of his injury. His due care was not in issue. [8] Under the statute the plaintiff may recover, even though her intestate was not in the exercise of due care, provided he was a passenger. *Commonwealth v. Boston & Lowell R. R. Co.*, 134 Mass. 211; *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, 71 N. E. 66; *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 86 N. E. 289. There is no doubt that he was a passenger before he left his seat in the car. The narrow question is whether he forfeited his rights as passenger by violating the regulation in going upon the step of the car while the train was in motion. This point is not covered by *Jones v. Boston & Northern Street Railway*, 205 Mass. 108, 90 N. E. 1152. The rule there under consideration did not forbid passengers to ride on the platform, but impliedly gave them permission to do so at their own risk. The regulation here presented absolutely prohibited in unequivocal terms the act of riding on the platform. [9] A common carrier is held, for the safety of passengers, to the highest degree of care consistent with carrying on its business. It is but just that passengers, in order to be entitled to this extraordinary care, should heed reasonable regulations made by the carrier for their convenience or security. The onerous obligation of care for passengers imposed by law on the carrier bears with it the correlative right to require observance of reasonable regulations for the safe transportation of passengers as a condition of continuance of the relation, and failure to comply with these will deprive the passengers of the protection to which they are entitled. The regulation offered in evidence was not complicated. It was so plain as to be easy of comprehension by an uneducated person. It required conduct only such as ordinary prudence on the part of a passenger would dictate. It was

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so conspicuously displayed that it might well have been found to have come to the knowledge of the decedent. Such regulations sometimes have been referred to as terms of the contract of carriage (*Tompkins v. Boston Elevated Railway*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A. [N. S.] 1063, 131 Am. St. Rep. 392) and sometimes as being broader than and different from contracts in their nature, in that they rest for their validity upon the power of the carrier to protect its passengers and itself by requiring conduct such as will conduce to safety and orderliness and promptness and efficiency of service. It is not necessary in the present case nicely to analyze their character. It is the law in some jurisdictions that they need not in all instances be brought home to the knowledge of the passenger in order to bind him.¹

[10] But sounder reason supports the view that a regulation, in order to be binding upon the passenger, must be known to him. There need not be positive evidence that it was expressly called to his attention. Knowledge may be inferred from widely posted notices, from the experience of the passenger in traveling, from the nature of the rule itself as according with the dictates of common prudence, and from other significant circumstances. *O'Neil v. Lynn & Boston Railroad*.

[11-13] These considerations would be decisive against a passenger seeking in his own right to recover damages for an injury. But this action is not by or in behalf of the passenger. It is not compensatory in its nature. It is brought under a penal statute to punish the railroad for causing through negligence the death of a passenger. The amount recovered does not go to his estate, but to his widow and children or next of kin. It is to be noted that this rule, although unequivocally prohibitive, did not by its terms undertake to state the consequences of its violation. It did not provide that infraction would terminate forthwith the rights of the offending passenger. It left the results of failure to observe it to be fixed by the law. There was no evidence that notice had been given to the intestate on former occasions that he would not be regarded as a passenger if he violated this rule, or that he well knew this was the consequence generally regarded as flowing from his act, or that he was avoiding the servants of the carrier so that his conduct would be unobserved and no notice could be given

1. *Johnson v. Concord Railroad*, 46 N. H. 213, 222, 88 Am. Dec. 199; *Whitesell v. Crane*, 8 Watts & S. (Pa.) 369, 373; *Trotlinger v. East Tennessee, Virginia & Georgia Railroad*, 11 Lea (Tenn.) 533, 536; *Railroad v. Turner*, 100 Tenn. 213, 220, 47 S. W. 223, 43 L. R. A. 140. See *Sharkey v. Lake Roland Railway*, 84 Md. 163, 167, 34 Atl. 1130; 155 Mass. 371, 29 N. E. 630; *Cheney v. Boston & Maine Railroad*, 11 Metc. 121, 123, 45 Am. Dec. 190; *Armstrong v. Montgomery Street Railway*, 123 Ala. 233, 247, 26 South. 349; *Macon & Western Railroad v. Johnson*, 38 Ga. 409, 437; *State v. Campbell*, 32 N. J. Law, 309.

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him, or that he was in a place where passengers might not go under proper conditions. In the absence of some such circumstances, the contract of carriage did not come to an end by the passenger being upon the platform of the car as it approached the station, even though contrary to the rule. Violation of a reasonable rule of a common carrier by a passenger, not involving malicious conduct, moral turpitude, gross and willful disregard of the rights of others or a plain surrender of the duty of a passenger does not of itself alone terminate the contract of carriage and transform the one who was a passenger into a bare licensee or trespasser. There must also be a notice by the common carrier or some one acting in its behalf calling the attention of the passenger to his act, which may be due to inadvertence or momentary forgetfulness or misapprehension. A passenger who merely fails to observe such a reasonable regulation does not thereby, under ordinary circumstances without other facts appearing, cease to be a passenger. He puts himself in the wrong, and the carrier may withdraw from him the rights and privileges of a passenger; but until this is done expressly or impliedly the rights of the passenger are not terminated. The fact that a passenger was upon the platform of the car while it was in motion would not justify the servants of the carrier instantly in treating him as a trespasser and in forcibly and summarily ejecting him from the train, and in refusing to let him return to take his place as a passenger. Yet if he had ceased to be a passenger, this conduct would be well within the right of the carrier. *O'Brien v. Boston & Worcester R. R.* 15 Gray, 20-24, 77 Am. Dec. 347. If after express notice of his wrongful conduct the passenger does not forthwith conform to the rule, then his rights as passenger cease and he becomes a trespasser, and may be excluded from the train. But until notice of some kind, the relation of passenger is not ended. *Hull v. Boston & Maine R. R.*, 96 N. E. 58, ante, and *Liversidge v. Berkshire St. Ry.*, 96 N. E. 665, ante, tend to support this view, although not reaching to the point now decided.

The clause of St. 1906, pt. 1, § 63, under which this action is brought, to the effect that no liability attaches to a railroad corporation "for the death of a person walking and being upon its railroad contrary to law or to the reasonable rules or regulations of the corporation" does not help the defendant, because the pivotal inquiry is whether the plaintiff's intestate had ceased to be a passenger.

[14-16] But upon another aspect of the case evidence of the "Regulation" was admissible. The plaintiff relied in part upon the gross negligence of the defendant's conductor and of the engineers of the express train and of the local train as grounds of liability. Evidence upon which this was predicated as to the conductor was that as the train approached the station he came from

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the car, ahead of that in which the plaintiff's intestate was riding, upon the platform between the two cars, looked first into the car where the plaintiff's intestate was riding to see if he was getting up, and then looked ahead continuously by the side of his train to see if the express was coming. The jury might have found that the intestate standing upon the lower step of the car before it had come to a stop was whirled off by the current of air created by the passing express train, without knowledge of his presence there by the conductor. This being so, conduct which would constitute due care on the part of the conductor if the intestate knew of the rule would or might be very different from that required if there had been no rule and passengers were in the habit of riding upon the platform. The conductor ordinarily would have a right to assume that passengers would obey rules established for their safety and conspicuously posted. The standard of care which could be exacted of him might depend in vital measure upon his assumption that passengers would do their duty in this respect. No obligation to warn or otherwise care for passengers upon the platform or steps rested upon him while his train was in motion, if the passenger had no right to be outside the car door until the train came to a stop and the conductor did not in fact know of his presence there. If the rule was conspicuously posted, the conductor might assume with propriety that passengers would comply with it and he would be in the exercise of due care if his conduct was that of a reasonably prudent man in view of that assumption. Due care did not require him to act on the theory that passengers would be negligent. Much less could he be found guilty of gross negligence for failure to act on that theory. As bearing upon the gross negligence of the defendant's conduct the rule should have been admitted in evidence. *O'Neil v. Lynn & Boston R. R.*, 155 Mass. 371, 29 N. E. 630; *Cutts v. Boston Elevated Railway Co.*, 202 Mass. 450-455, 89 N. E. 21. For the same reasons the regulations would be competent evidence bearing upon the gross negligence of the engineer of the express train and of the local train provided they or either of them knew of the posting of the regulations and did not know that commonly it was disregarded.

[17] The remaining exception argued by the defendant is covered in large part by the earlier decision of this case, in *Renaud v. N. Y., N. H. & H. R. Co.*, 206 Mass. 557, 92 N. E. 710. But so far as not included in that decision no error is shown. Failure to see, on the part of a locomotive engineer, when he ought to have seen and when the consequences of such failure might result in the death of a human being, may be found to be gross negligence.

Exceptions sustained.

TEXAS CENT. R. Co. et al. v. HANNAY-FRERICHS & Co.

(Supreme Court of Texas, Jan. 24, 1912.)

[142 S. W. Rep. 1163.]

Carriers—Transportation of Goods—Delay—Damages.*—In an action against a carrier for delay in the transportation of goods, plaintiff is entitled to interest at the legal rate on the value of the shipment for the time it was delayed.

Carriers—Action—Assignment of Cause of Action.—An assignment to plaintiff of a claim by a consignor for damages for delay in delivery vested in him the right of the shipper.

Carriers—Delay of Shipment—Penalty.—Rev. St. 1895, art. 4496, provides that, on refusal of a railroad to transport any property or deliver it at the regular appointed time, it shall pay all damages sustained, and in case of the transportation of property shall in addition pay special damages of 5 per cent. per month on the value of the property at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for transportation. Held, that a contention that the statute implied that other damages accrued and that the 5 per cent. was to be given only "in addition" to other damages was without merit.

Carriers—Transportation of Goods—Delay—Penalty—Constitutionality.†—Rev. St. 1895, art. 4496, imposing on a railroad company a penalty of 5 per cent. per month on the value of a shipment during its negligent detention in transportation, does not violate Const. art. 1, § 13, declaring that excessive fines should not be imposed, nor cruel and unusual punishment inflicted.

Constitutional Law—Presumptions as to Validity.—A law regularly enacted by the Legislature is to be sustained unless its invalidity is manifest.

Criminal Law—Cruel and Unusual Punishment—Federal Constitution—Application to State Legislation.—The provision of the federal Constitution prohibiting cruel and unusual punishment does not apply to the legislation by the states.

*See sixth foot-note of *Ide v. Boston & M. R. R.* (Vt.), 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

†See first foot-note of *St. Louis, etc., Ry. Co. v. State* (Ark.), 41 R. R. R. 367, 64 Am. & Eng. R. Cas., N. S., 367; second foot-note of *Railroad Comm'rs v. Atlantic C. L. R. Co.* (Fla.), 40 R. R. R. 497, 63 Am. & Eng. R. Cas., N. S., 497; foot-note of *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.* (Va.), 40 R. R. R. 191, 63 Am. & Eng. R. Cas., N. S., 191; foot-note of *Martin v. Oregon R., etc., Co.* (Ore.), 39 R. R. R. 710, 62 Am. & Eng. R. Cas., N. S., 710; second head-note of *Atlantic C. L. R. Co. v. State* (Ga.), 39 R. R. R. 672, 62 Am. & Eng. R. Cas., N. S., 672; foot-note of *People v. Baltimore, etc., R. Co.* (Ill.), 38 R. R. R. 697, 61 Am. & Eng. R. Cas., N. S., 697; last head-note of *Lidel v. South Dakota Cent. Ry. Co.* (S. Dak.), 38 R. R. R. 641, 61 Am. & Eng. R. Cas., N. S., 641.

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Carriers—Regulation—Repeal of Statute.—Rev. St. 1895, art. 4496, provides that, on the refusal of any railroad to transport any property or deliver it at the regular appointed time, it shall pay to the aggrieved party all damages sustained, and in case of transportation of property shall pay special damages of 5 per cent. per month upon the value of the property at the time of shipment for the negligent detention thereof beyond the time reasonably necessary for its transportation. Railroad Commission Law (Rev. St. 1895, art. 4574) provides that if any railroad shall charge or collect a greater or less compensation for any service rendered or to be rendered than it charges or collects from any other person for doing a like service it shall be deemed guilty of unjust discrimination, and article 4575 gives a right to recover a penalty and damages for a violation of the statute, the penalty being in a named sum, and article 4581 saves the rights of parties to recover under other provisions of the statute. Held, that article 4496 is not repealed by implication by the other statute, there being no conflict.

Carriers—Transportation—Delay in Transportation—Penalties—Defenses.—Where a carrier did not require prepayment of freight charges as authorized by Rev. St. 1895, art. 4494, it waived such prepayment, so that failure to prepay was not a defense to an action under article 4496, imposing a penalty for delay in transportation.

Carriers—Delay in Transportation—Penalties.—In an action against a carrier under Rev. St. 1895, art. 4496, imposing a penalty for delay in transportation, the burden was on defendant to show that the delay was not negligent.

Carriers—Delay in Transporting Goods—Damages.—In an action under Rev. St. 1895, art. 4496, to recover a penalty for delay in transporting goods, evidence of any circumstances which contributed to produce the delay in spite of ordinary diligence on the part of the carrier was admissible to disprove negligence.

Carriers—Transportation of Goods—Delay—Penalty.—That shippers were notified by a carrier of conditions which prevented delivery of shipments in the usual time was no defense to an action for the penalty for delay in transportation under Rev. St. 1895, art. 4496, as a knowledge of the existence of the facts would not be sufficient to charge the shipper with notice of their effect on the carrier.

Carriers—Delay in Transporting Freight—Penalty.—In an action under Rev. St. 1895, art. 4496, to recover a penalty for delay in the transportation of freight, an answer alleging that there was great prosperity in the country at the time, and that trade conditions demanded a larger number of cars than had ever been required, was demurrable, in the absence of any allegation of how the ability of defendant to move freight was thereby affected.

Carriers—Transportation of Freight—Delay.—In an action under Rev. St. 1895, art. 4496, against a carrier for a penalty for delay in transporting freight, an answer alleging that owing to the unusual

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conditions it was difficult to secure help in railroad offices, was subject to exception, in the absence of any allegation of how that fact contributed to the delay.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Hannay-Frerichs & Co. against the Texas Central Railroad Company, in which the International & Great Northern Railroad Company and the Houston & Texas Central Railroad Company and the Gulf, Colorado & Santa Fé Railroad Company were impleaded. Judgment for plaintiff was affirmed by the Court of Civil Appeals (130 S. W. 250), and defendants bring error. Affirmed in part, and reversed in part.

Collins & Cummings, J. A. Kibler, Terry, Carin & Mills, C. K. Lee, King & Morris, Baker & Baker, Baker, Botts, Parker & Garwood, and W. E. Spell, for plaintiffs in error.

Morrow & Smithdeal, for defendant in error.

BROWN, C. J. The defendants in error, hereafter designated as "the company," sued the Texas Central Railroad Company for damages to cotton delivered to it for transportation, and that railroad company interpleaded the International & Great Northern Railroad Company, the Houston & Texas Central Railroad Company, and the Gulf, Colorado & Santa Fé Railroad Company. The plaintiff filed an amended petition seeking to recover against each and all of the railroads damages arising out of the shipment of a large number of bales of cotton. It was alleged that the cotton was delivered to the Texas Central Railroad Company at Hico, Leon and Gorman stations on its railroad to the number of 8,305 bales, each bale being of the value of \$65. The cotton was delivered to and received by the said company for transportation to Houston and Galveston. All of said cotton was delivered to said railroad by Knoop-Frerichs & Co. who assigned their claim to defendants in error. The Texas Central Railroad Company delivered the cotton to its codefendants for transportation to destination. There was much delay in the transportation of the cotton for which damages were claimed, and it was alleged that the delivery of the cotton at destination was negligently delayed, for which a penalty was claimed under article 4496, Revised Statutes. The allegations of the plaintiff's petition set up the transactions in detail, but much of it is unnecessary to the decision of the question presented here—that found necessary will be quoted.

The Texas Central Railroad Company pleaded in proper manner, first, that at the time the several deliveries of cotton were made to it there was a strike of the employees of the different railroads which were engaged in cotton at Galveston, which strike

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prevented the unloading of cars for a great time, and thereby prevented the return of the cars for use in carrying other cotton to that place, and by such strike defendant was prevented from transporting the cotton with the usual dispatch. It was alleged that when the cotton was delivered for transportation the shippers were informed of the blockade of transportation by reason of the strike and other causes and delivered the cotton with the understanding and agreement that the transportation of it might be delayed by such conditions. The answer was full and sufficient to present the issues. The plaintiff filed a general demurrer and special exceptions to the answers which were sustained. The Texas Central Railroad Company pleaded that in the years 1906 and 1907 the yield of cotton in the territory through which its road was operated was unprecedented in quantity, that such yield could not be anticipated and that it was impossible for it to furnish sufficient cars to carry the said cotton, from which cause the delay occurred. That its line of road was inland and it was dependent upon its codefendants and other lines of road which reached Houston and Galveston to return its cars when delivered to them and to furnish other cars which the said railroad failed to do, whereby the delay was without fault on its part. A general demurrer and special exceptions were sustained to the answer. It shall appear that other facts are necessary to understand any question of law involved, we will state such additional facts. Each of the railroad companies filed general demurrers to the amended petition and answers presenting the same issues. Upon trial before a jury judgment was rendered against the defendants.

The first assignment of error reads: "The Honorable Court of Civil Appeals erred in overruling the first assignment of this plaintiff in error in said court, complaining of the action of the trial court in overruling the general demurrer of this plaintiff in error to the plaintiff's petition."

[1] Under this assignment are nineteen propositions, which really present but three issues of law: (1) That the 6 per cent. interest on the value of the property delayed cannot be recovered. This court has held that in such case the legal rate of interest may be recovered. *Dorrance v. Railway Co.*, 125 S. W. 561. In that case the party had borrowed money because of the delay. In this case the consignor presumably was by the delay prevented from converting the cotton into money and lost the use of the amount invested in it. The same principle underlies both cases. If money had been shipped and delayed the measure of damage would have been 6 per cent., lawful interest, for the time of delay. That would compensate for the loss. Here the money was in the cotton, and the injury the same.

[2] It is claimed the petition does not show that the cotton be-

longed to plaintiffs at the time of the delay. Knoop-Frerichs & Co. were the consignors and also the consignees, there being no evidence of change, and the presumption would be that the ownership continued. The petition alleged an assignment to plaintiffs of the claim by the original consignors, which vested in plaintiffs the rights of the shippers.

[3] It is insisted that the language of article 4496, Rev. St. 1895, implies that other damages had accrued, and that the 5 per cent. was to be given only "in addition" to other damages. We do not agree to that construction, but, if correct, other damages did accrue by reason of the delay; that is, the deprivation of the use of the money invested. The language was used to show that the 5 per cent. was not intended to exclude other damages for delay.

[4] Again, the plaintiffs in error urge upon this court the proposition that the "special damages" provided for by article 4496 is a penalty, and is so excessive as to violate section 13 of article 1 of our state Constitution, which reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law."

The validity of an act of the Legislature is at all times to be dealt with by this court with caution that the legislative power be not improperly interfered with.

[5] It is a correct rule of construction that a law regularly enacted by the legislative department shall be sustained, unless its invalidity is manifest. In *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S. W. 951, a similar question was before this court and it was said: "It is also contended by appellee that the act of 1899 [Acts 26th Leg. c. 146], is unconstitutional and void, because it imposes upon persons who may violate its provisions excessive and unreasonable penalties in violation of section 13, art. 1, of the Constitution, which provides that, 'excessive bail shall not be required nor excessive fines imposed nor cruel or unusual punishment inflicted.' Prescribing fines and other punishments which may be imposed upon violators of the law is a matter peculiarly within the power and discretion of the Legislature, and courts have no right to control or restrain that discretion except in extraordinary cases where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind. 13 Am. & Eng. Enc. of Law, 60; *Express Co. v. Walker*, 92 Va. 66, 22 S. E. 809, 41 L. R. A. 436. In the case cited the court said: 'The imposition and regulations of fines belong to the Legislature, and to its discretion and judgment the widest latitude must be conceded. Fines are to be fixed with reference to the object they are designed to accomplish. * * * What is to be the legis-

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lative guide, in performance of its duty, but its sound judgment and the wisdom of experience? And how can courts with reason and propriety question the action of the Legislature or control or restrain its discretion except where the minimum penalty is so plainly disproportioned to the offense or act for the violation of which it is affixed as to shock the sense of mankind? There is a wide range for the discretion of the jury between the minimum and the maximum penalties fixed by this act, and we are not able to say that the minimum penalty inflicted upon an individual would be so excessive as to 'shock the sense of mankind.' "

The language copied is quite as appropriate in this case as in that. The regulation and control of public utilities is peculiarly within the power of the Legislature, and this court will not interfere with the exercise of that authority, except in case of manifest violation of the Constitution.

If one bale of cotton had been delayed one month the penalty of 5 per cent. on its value, \$65, would be \$3.25, which would not be excessive. But when more than 8,000 bales of the value of \$605,000 have been so delayed, the penalty would be \$30,250, a large sum. The magnitude of the damages or penalty is, not in the law, but arises from the number of violations. We do not believe that a law can be rendered invalid by frequent violations of its mandates whereby accumulated fines would amount to a large sum. The article of the statute is not in conflict with the Constitution of this state.

[6] The provision of the Constitution of the United States does not apply to such legislation by the states. *Peryear v. Commonwealth*, 5 Wall. 475, 18 L. Ed. 608. That court said: "The third proposition of the plea is that fines and penalties imposed and inflicted by the state law for offenses charged in the indictment are excessive, cruel, and unusual. Of this proposition it is enough to say that the article of the Constitution relied upon in support of it does not apply to state but to national legislation."

[7] Under the first assignment of error plaintiffs in error present this proposition: "Article 4496 of the Revised Statutes of the state of Texas was repealed by the provisions of the Railroad Commission Act, passed in 1891, particularly by articles 4574, 4575, and 4581 thereof, treating of the same subject-matter, and both expressly and in effect repealing all laws or parts of laws in conflict therewith."

The articles of the statutes named in the proposition are parts of the Railroad Commission law. The first paragraph of article 4574 is in this language: "If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects

or receives from any other person, firm or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited."

This clearly defines the purpose of the article to be to define unjust discrimination. Subdivisions 1, 2, and 3 state the particular acts which constitute unjust discrimination, and subdivision 4 declares the punishment for a violation of the law, and subdivision 5 enumerates the exceptions. There is no conflict between this article and article 4496, therefore repeal by implication cannot be declared by the courts. Article 4575 gives a right to recover a penalty and damages for violation of that law; but the penalty is in a named sum of not less than \$125 nor more than \$500. There is nothing in this article which is in conflict with article 4496 and there is no repeal. Article 4581 saves the rights of parties to recover under other provisions of the law, showing there was no intention to repeal the article on which this action is based. Plaintiffs in error contend that the penalty cannot be recovered because there was no proof that the freight charges were paid. Article 4494, Revised Statutes, contains this language:

[8] "Every such corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for transportation at the place of starting, and the junction of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places on the due payment of the tolls, freight or fare legally authorized therefor."

The railroad company might have refused to receive the cotton or to transport it except upon prepayment of freight, but when it received the freight there was a waiver of prepayment.

We do not think it necessary to discuss the assignment which asserts that the court erred in overruling their general demurrer to plaintiff's petition. We are of opinion that the allegations, if true, showed a cause of action.

Assignments from 12 to 25, inclusive, assert that the trial court erred in sustaining plaintiff's special demurrers to defendant's special answers. We copy from the answer as follows: "For further and separate answer herein, this defendant shows that if there were any delays in the movement of the plaintiffs' cotton over the line of this defendant, or if there were any delays of the said cotton at all while in transit which were in any way directly or indirectly traceable to any acts of this defendant, which is not admitted, but expressly denied, the defendant says that such delays were not the result of any fault or negligence of this de-

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fendant, but were the result of unusual, unprecedented and extraordinary conditions arising and coming up either shortly prior to the time the plaintiffs' cotton was tendered for shipment and was in transit, or during such time and continuing during the entire time said shipments were in transit, or were the result of the effects of such extraordinary and unusual and unprecedented conditions so continuing during the entire time that the plaintiffs' said shipments were in transit. Defendant shows that said conditions were entirely unexpected by this defendant and the other railroads in the state of Texas (said conditions affecting practically every railroad in the state, and the effect thereof in most instances being common to all), and in the exercise of reasonable diligence could not be anticipated, and even if they could have been anticipated, or their probable occurrence known, they could not have been anticipated or known sufficiently far in advance of their occurrences for this defendant and the railroads of the state generally to have provided against the effects of such occurrences and such extraordinary conditions in the exercise of the diligence required of it by law."

The pleader then proceeds to state in separate paragraphs the particular conditions and circumstances which prevented the prompt transportation and delivery of the cotton. The defendants in error filed special exceptions to the answers which were sustained, which action is assigned as error. We will summarize the answers which are too lengthy to be copied. The action was to recover actual damages and the special damages (penalty) for negligent delay in the shipment of cotton.

[9, 10] Article 4496, Revised Statutes, placed the burden on the defendant to show that the delay was not negligent. Whatever circumstances contributed to produce the delay in spite of ordinary diligence on the part of the carrier, and to which circumstances the carrier did not contribute, were admissible to disprove negligence.

[11] It is said in the application that the shippers were notified by the railroad company of the conditions which prevented shipments in the usual time. If the allegation be true as stated in the answer, the fact would not bar the plaintiff's recovery of actual or special damages. A knowledge of the existence of the facts alleged would not be sufficient to charge the shipper with notice of their effect upon the railroad company receiving the freight. *M., K. & T. Ry. Co. v. Stark Grain Co.*, 131 S. W. 410. Notice or knowledge of the existence of the alleged conditions would not relieve the carrier of its liability for a breach of its contract for carriage unless its liability to comply with the law by reason of such conditions was made known to the shipper before delivery of the cotton.

The answers in a number of paragraphs proceed to set out the facts and circumstances relied upon as follows:

[12] It was alleged that there was great prosperity in the United States in the fall of the year 1906, and its trade conditions demanded a much larger number of cars and other equipments than had been required at any previous time. This does not show in what way the ability of the defendants to carry the freight as usual was affected by such conditions, and was immaterial to the issues in this case. The demurrer was properly sustained to that portion of the answers.

[13] Under assignment 19 in the application, complaint is made of the ruling of the Court of Civil Appeals in sustaining the action of the district court which sustained exceptions to a paragraph of the answers which alleged that owing to the unusual conditions it was difficult to secure help in the railroad offices. The exception was properly sustained. It does not appear in what manner the scarcity of help in the offices contributed to the delay in transportation.

We do not deem it necessary to discuss in detail the different conditions and facts alleged in the special answers. We have indicated those parts that in our opinion were properly eliminated because too remote to be accorded any weight as evidence, and as to the remaining paragraphs we conclude that the facts alleged in each tended to show conditions which may unavoidably have contributed to the delays in transportation of the cotton involved in this suit. Article 4496 implies a presumption that a delay in transportation was negligent and casts upon the carrier the burden of refuting the presumption, and we are of opinion that the facts, circumstances and conditions alleged, if true, tended to overthrow the law of presumption. The exceptions should not have been sustained to those paragraphs of the answer.

It is ordered that the judgment rendered in this case for actual damages be and the same is affirmed, and that in so far as the judgments award special damages that judgment is reversed and as to that issue the cause is remanded. It is ordered that the plaintiffs in error recover the costs of this court and of the Court of Civil Appeals.

SOUTHERN RY. CO. *v.* WALLACE.

(Supreme Court of Alabama, Nov. 21, 1911.)

[56 So. Rep. 714.]

Carriers—Carriage of Live Stock—Excuse for Nondelivery.*—If a shipper contracted for the transportation of cattle and a horse in one car, and the shipment of the cattle was prevented by legal quarantine, and the shipper refused to permit the horse to be shipped separately, he could not recover against the carrier for failure to deliver the horse at destination.

Carriers—Carriage of Live Stock—Actions—Form.†—Where, upon the carrier's inability to ship the stock to destination because of quarantine, they were shipped back to the original shipping point and tendered to the shipper, when he declined to receive them and directed the carrier to do whatever it saw fit, and the stock were sold and the money held for the shipper, he could not recover as for a conversion of the stock at the original shipping point.

Carriers—Carriage of Live Stock—Right of Action.†—If the shipper directed that the stock be returned to the original shipping point from an intermediate point upon the carrier's inability to forward them to destination because of quarantine regulations, he could not recover from the carrier for their conversion at such intermediate point.

Damages—Evidence—Admissibility—Breach of Contract for Carriage of Live Stock—Value.—If, in an action by a shipper for failure to deliver, it appeared that the carrier was not liable for nondelivery, it was error to permit proof of the value of the stock at the intended destination.

Damages—Evidence—Admissibility—Breach of Contract for Carriage of Live Stock—Value.—Where the conversion of stock by a carrier occurred at an intermediate point if at all, it was error to admit evidence of the value of the stock at the point of the final intended destination.

Appeal and Error—Review—Harmless Error—Admission of Evidence.—In an action against a carrier for the conversion of live stock, alleged to have occurred at an intermediate point, error in admitting evidence of its value at the final intended destination in another state

*See foot-note of Alabama & V. R. Co. *v.* Tirelli Bros. (Miss.), 33 R. R. R. 757, 56 Am. & Eng. R. Cas., N. S., 757.

†For the authorities in this series on the question what does, and does not, constitute conversion of freight by a carrier, see first foot-note of Taugher *v.* Northern Pac. Ry. Co. (N. Dak.), 39 R. R. R. 719, 62 Am. & Eng. R. Cas., N. S., 719; second head-note of Southern Ry. Co. *v.* Moody (Ala.), 39 R. R. R. 319, 62 Am. & Eng. R. Cas., N. S., 319.

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was prejudicial to the carrier, where it appeared that the value of the stock was greater at the final intended destination than either at the point of shipment or such intermediate point.

Carriers—Carriage of Live Stock—Connecting Carriers—Refusal to Receive—Duty of Initial Carrier.—If the connecting carriers refuse to receive live stock, it is the duty of the initial carrier to notify the consignor so as to enable him to give further shipping directions, unless the property is of such a perishable nature that the taking of time necessary to give notice would probably injure it.

Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge.

Action by R. L. Wallace against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

C. E. Jordan, for appellant.

Joseph H. Nathan and *A. E. Walker*, for appellee.

MAYFIELD, J. The facts of this case are, in short, and substantially, as follows: Appellee, a live-stock man, delivered to appellant, as a common carrier, on the 7th of January, 1910, 72 head of cattle and 1 stallion, to be carried for hire from Florence, Ala., to McMullen, Mo. The shipment was transported to Memphis, Tenn., by appellant, where the cattle had to be delivered to the next connecting carrier, the Frisco Line, which was shown to be the only connecting carrier to which delivery could be made. The Frisco Line declined to receive the shipment on account of federal quarantine regulations which prohibited shipments of live stock from Alabama to Southern Missouri, the contemplated destination of this shipment. The shipper being present, and knowing of the refusal of the connecting carrier to receive or transport the shipment, without giving any specific instructions to the carrier, went on to Van Duesen, Mo., with a promise, as he claims, from Mr. Gray, the agent of the carrier, that he would have the government man or the Frisco people deliver the stock to the shipper. The shipper also testified for him in this connection as follows: "I gave him my address and left. He asked me what to do with it (the shipment) in case he could not get it through. He said he would send it back to Florence. I objected to its being shipped back there. I told him, in case he could not get it through, to send it to St. Louis for immediate slaughter."

Mr. Gray, agent for the Southern Railway Company, as to the same transaction, testified as follows: "Shipment remained at Memphis in the H. T. Bruce stock pen from January 11th, at 9:30 a. m., to January 13th, at 11:00 a. m., and was cared for, watered, and fed, by H. T. Bruce & Co. at the expense of the owner. Cannot advise the length of time R. L. Wallace remained with the

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shipment in Memphis. Mr. Wallace was notified by myself personally that shipment in question could not be moved into the quarantined district of Missouri, from Florence, Ala., on account of his negligence in not obtaining from the inspector in charge of the quarantined district of Missouri proper certificate and permit allowing the entrance into said quarantined district. Mr. Wallace stated to me that he would go on to McMullen, Mo., and permit the cattle and horse to remain in possession of the carrier, declining to give me any definite instructions as to the disposition of the shipment. I do not know personally whether his intention in this respect was carried out or not, and whether the shipment was actually abandoned by him or not. The federal authorities permitted us to send the shipment back to Florence."

T. C. Collins, agent of the stockyards at Memphis, testified as to the same matter as follows: "I know this shipment of cattle and the horse were reshipped to Florence, but I do not know by whose order. The railroad company—that is, the Southern Railway—suggested to R. L. Wallace that he allow them to ship the stallion on to destination. At first he talked as if he would consent to this, but he finally directed Mr. Gray, the agent of the Southern Railway at Memphis, to send the whole shipment back to Florence, Ala. I know that Mr. Wallace, the owner, was informed by the United States quarantine officer that the cattle would not go on to destination. The owner, R. L. Wallace, remained in Memphis for about one day after the shipment arrived, and then left, saying he was going to Florence, Ala. I have never seen anything more of him since. Mr. Wallace told me that he knew there was a quarantine against cattle going to McMullen, Mo., before he made the shipment, but the railroad company in Florence told him the shipment would go through all right."

The shipment was carried back to Florence, and there tendered to the shipper, who declined to receive it unless the carrier would pay him \$500 damages, and stated to the carrier's agent that unless that was done he would not receive the shipment, and that the carrier could make such disposition of the shipment as it saw fit.

The complaint contained a great number of counts, but the plaintiff finally eliminated all except counts 6, 7, and 9, which were in code form. Counts 6 and 7 were in trover, for conversion of the shipment, one claiming as for the cattle and the other as for the horse, while count 9 was for the failure to deliver the horse.

[1] The contract in question—whatever it may have been originally—being for the shipment of the cattle and the horse as one lot, and in one car, and shipment of the cattle being made impossible because in violation of law, and plaintiff declining to allow the horse to be shipped separately (as shown by the testimony of Collins, which was not denied by plaintiff), under the undisputed evidence there could be no recovery under the ninth count.

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[2] There could be no recovery as for a conversion at Florence, under counts 6 and 7, because the undisputed evidence shows that the carrier tendered the stock to the shipper and he declined to receive it, and directed the carrier to do whatever it saw fit, upon which the carrier sold the stock and held the money for the plaintiff—which was all that it could do.

[3] This the plaintiff seems to concede, but he insists that the conversion occurred in Memphis, and upon this theory had the defendant's evidence excluded, as to what occurred after the shipment was returned to Florence, except that as to the bare fact of tender.

Touching whether or not there was a conversion of the stock at Memphis, most of the evidence in favor of the plaintiff was disputed. If the defendant's evidence was true, the plaintiff directed that the stock be shipped back to Florence in case it could not be sent to the intended destination. If this was the truth of the matter, there was no conversion in Memphis, and the court should not have excluded the evidence as to the transactions and conversations between the parties after the shipment arrived in Florence, upon the theory that the conversion had already occurred in Memphis, and that these conversations and transactions were thereafter incompetent and irrelevant.

[4] It was likewise error, for the reason above shown, to allow the plaintiff to make proof of the value of the stock in Missouri, the point of intended destination, because, as we have shown, there could be no liability for failure to deliver, and none was sought to be fixed, as to the cattle.

[5, 6] As the conversion occurred in Memphis, if at all, evidence of the value of the stock in Missouri was not admissible for any purpose, and, it appearing that the value there was greater than in either Memphis or Florence, it is affirmatively shown to have been injurious to the defendant.

"Like every other person, the carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place where his undertaking is to be performed. If, therefore, without his fault or neglect the goods are lost or injured by the act or mandate of the public authority, the carrier should be excused, and such is the rule of law. If the goods, without his fault, are or become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority, as in the case of the seizure or destruction of goods infected with contagious diseases, or of intoxicating liquors intended for use or sale in violation of law, the carrier cannot be held liable." Hutchinson on Carriers, §§ 324, 325.

"Where plaintiffs shipped certain cattle and horses in the same car, and the carrier negligently unloaded the cattle in pens, by reason of which they were exposed to Texas fever, whereupon

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the connecting carrier refused to accept the cattle for shipment to their destination, but offered to ship the horses, which plaintiffs refused, they were not entitled to recover against the initial carrier for delay in shipping the horses, occasioned by their requirement that both horses and cattle should be shipped together." *Missouri, K. & T. Ry. v. Wells*, 22 Tex. Civ. App. 255, 54 S. W. 939.

As the case must be reversed for the reason assigned, it is unnecessary to pass upon other questions, especially those of variance, and that, as to whether there can be a recovery as for conversion in Memphis, because that question is not properly presented on this appeal.

[7] As to the duty of the initial carrier when the connecting carrier declines to receive the goods for further shipment, this court, in the case of *L. & N. R. R. Co. v. Duncan & Orr*, 137 Ala. 455, 34 South. 990, a case similar to this, said: "On the state of facts existing with reference to this consignment after the car had reached Montgomery, and the Plant System had refused to accept it for carriage to Greenville, if that company did so refuse—and on this issue it seems to us that the evidence was all with the defendant—it was defendant's duty to give notice of that fact to the consignors to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it. We do not find on the evidence in this record that any such delay would have been entailed by taking the time necessary to these ends, or, at least, we may say that, with this issue properly in the case, it would be open to the jury to find that the defendant was remiss of its duty in this connection. Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen in Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham and receiving their reply."

Reversed and remanded. All the Justices concur.

ATLANTIC COAST LINE R. CO. *v.* WHITNEY.

(Supreme Court of Florida, Division A. Nov. 14, 1911. Rehearing Denied Dec. 6, 1911. Headnotes Filed Jan. 6, 1912.)

[56 So. Rep. 937.]

Courts—Conflicting Jurisdiction—Rights Under Federal Statutes.—Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), generally known as the "Employer's Liability Act," confers rights which may be enforced in the state courts.

Courts—Conflicting Jurisdiction—Rights Under Federal Statutes.—When an interstate railroad company fails to comply with the federal statute fixing a standard of duty whereby an employee is injured, he may recover compensation for such injury in the state courts.

Master and Servant—Injuries to Third Persons—Competency of Employee.*—In an action against a railroad company for injury caused by the malpractice of its surgeon, the evidence must show either actual knowledge of the unfitness of the surgeon selected or retained by it, or that his general reputation was so bad that the law will impute knowledge. It is not competent to show specific acts of unskillfulness not brought home to the company.

Error to Circuit Court, Alachua County; J. T. Wills, Judge.

Action by John A. Whitney, by his next friend, Nora H. Whitney, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

C. R. Layton and *R. A. Burford*, for plaintiff in error.

W. S. Broome and *A. H. King*, for defendant in error.

COCKRELL, J. Whitney recovered judgment against the railroad company in the sum of \$20,000 for the loss of his right leg, and upon this judgment the company assigns over 100 errors. We shall not undertake to treat separately these numerous assignments, since we find that those now of moment may be discussed under a few general heads.

The cause of action is twofold: First, for the original injury, and then for the subsequent alleged malpractice of the surgeon for the railroad company. The negligence as to the first consisted of the failure of this interstate railroad company having its cars equipped with automatic couplers as required by the fed-

*See last foot-note of *Youngstown Park, etc., Ry. Co. v. Kessler* (Ohio), 41 R. R. R. 603, 64 Am. & Eng. R. Cas., N. S., 603; foot-note of *Arkansas Mid. R. Co. v. Pearson* (Ark.), 41 R. R. R. 100, 64 Am. & Eng. R. Cas., N. S., 100.

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eral statute, Whitney being at the time employed in making a coupling; and the negligence as to the second cause of action was in that the surgeon selected by the company was not possessed of ordinary competence and skill in his profession, which lack of competence and skill was known or should have been known by the company.

It is urged as to the first cause of action that it is doubtful whether the charge is against a failure to equip or a failure to maintain automatic couplers, but, as the duty to keep the cars equipped is absolute (*Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582), we see no occasion for embarrassment as indicated in the motion to make the declaration more specific.

[1, 2] By an amendment to the declaration, the original negligence is based squarely upon the failure of the company to comply with Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. Supp. 1909, p. 1171), generally known as the "Employer's Liability Act," and it is asserted that said act is void, as being in violation of section 1 of the fourteenth amendment to the federal Constitution, and, further, that said act does not authorize the institutions of actions thereunder in the state courts, but in the federal courts only. We think both these contentions decided adversely to the plaintiff in error by the Supreme Court of the United States in several decisions lately announced, particularly in the case of *Chicago, B. & Q. Ry. Co. v. United States*, supra, construing *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, and in *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681.

In the last-named case, that court reversed the Supreme Court of Pennsylvania for failing to give an employee the benefit of the safety appliance, which exonerated him from the doctrine of assumption of risks. In *Chicago, B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, that court held that the Congress not being satisfied with the common-law duty and its resulting liability has prescribed and defined the duty by statute, and that, if the railroad does in point of fact use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it.

The federal statute therefore creates, by enlargement perhaps, but still creates, a private right to an individual injured by the neglect of its provisions, and there are no negative words forbidding the enforcement of that right in the state courts. The highest authority upon that point has held that the state courts must give effect to the provision in the act exonerating the employee from the defense of assumed risk, and we are clear would hold, in effect has held, that the state courts must recognize the right in an employee to demand the fulfillment of the statutory

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duty to the extent of affording him compensation if injured by reason of the nonfulfillment. See *Bradbury v. Chicago, R. I. & P. Ry. Co.*, 149 Iowa, 51, 128 N. W. 1. We are not disposed to follow the decision in *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754, which seems to stand alone in refusing to apply this federal statute.

[3] To make out a case against the railroad for a subsequent injury occasioned by the alleged malpractice of the surgeon, it is charged that the surgeon was unskillful and incompetent, and that the defendant knew or ought to have known that he was so lacking. In *South Florida R. Co. v. Price*, 32 Fla. 46, 13 South. 638, we held that, if a liability exist, the whole duty is performed when it employs a person of ordinary competence and skill in that profession, and that, having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such.

Assuming, as in the *Price Case*, that a liability is made out by the allegations in the declaration, was there competent proof before the jury to justify a finding on that ground? On this point we think the court erred.

The plaintiff exhibited to the jury several witnesses, too much in the nature of exhibits, who testified, over proper objections, that they had been injured by this defendant, and subsequently had received maltreatment at the hands of this surgeon, and one surgeon testified that a certain operation by the railroad surgeon was not successful, but could not say from an examination of the wound whether the treatment was proper or not; while another surgeon testified to finding a piece of gauze in a wound that should have been removed. It further appears that the chief surgeon of the railroad hospital knew of a treatment by this surgeon which it is claimed was improper. It appears that the surgeon complained of was a graduate of reputable medical schools, and there is no evidence as to his general reputation as to skill and competence being bad, nor that the president or other executive head of the railroad company had actual knowledge that he was unskillful or incompetent in his profession.

The case before us demonstrates to our minds the wisdom of adhering to the general reputation, rather than isolated instances, to bring home to the principal guilty knowledge of incompetence. Every witness exhibiting his injuries before the jury tended to inject new issues which the defendant could not in reason be prepared to meet. The railroad company must provide competent engineers, not merely exercise some care in selecting them, and a different rule as to those servants engaged in operating the trains, in performing its duty as a common carrier, may well obtain; but, as we have heretofore decided, the railroad company is not responsible for the negligent work of its surgeon, if not negligent in selecting or retaining him, and

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knowledge of his failings must be brought home to it. His general reputation may be so bad that the law will impute knowledge; but nothing short of this will make it liable. This rule forbidding particular instances is in direct accord with previous rulings of this court on somewhat similar conditions, and is the ruling of the only direct adjudication to which our attention has been directed. In *Lacy v. Kossuth County*, 106 Iowa, 16, 75 N. W. 689, it is held that evidence of particular acts is not admissible to prove the competency of a physician. His general reputation for skill is alone relevant, which can be proved only by persons knowing such reputation in the community where he is engaged in practice.

What we have said disposes of the principal points presented. The others do not go to material points, or are apt to be presented under a different form at another trial. The plaintiff is now of age, and there can be no further question as to bond by his next friend.

The judgment is reversed, and a new trial awarded.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER and PARKHILL, JJ., concur in the opinion.

MILLER v. ATLANTIC COAST LINE R. CO. et al.

(Supreme Court of South Carolina, Dec. 21, 1911.)

[73 S. E. Rep. 71.]

Master and Servant—Injured Employee—Acceptance of Benefits—Repeal of Statute.—Act Feb. 23, 1903 (24 St. at Large, p. 79), providing that the acceptance of benefits by an injured employee of a railroad company maintaining a relief department shall not bar a recovery by the employee of damages for the injury, is not repealed impliedly by Act March 7, 1905 (24 St. at Large, p. 962), containing substantially the language of the act of 1903, but extending it so as to apply to any corporation, firm, or individual maintaining a relief department for employees, and which merely declares that all acts inconsistent with it shall be repealed.

Master and Servant—Regulation of Employment—Statutes—Applicability.—Act March 7, 1905 (24 St. at Large, p. 962), providing that the acceptance of benefits by an employee of an employer maintaining a relief department for employees shall not bar a recovery by the employee for the injuries sustained, is a reasonable regulation within the police power of the state, and is applicable to a contract between an employer and an employee made before the passage of the act, and providing that the acceptance of benefits shall operate

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as a release of any right of action, and an employee injured after the passage of the act may rely on its provisions, though the contract of employment was made prior to its passage.

Courts—Decisions—Federal Questions.—The decisions of the federal Supreme Court on federal questions are conclusive on the state courts.

Constitutional Law—Master and Servant—Freedom to Contract—Police Power—Employee's Relief Fund—Acceptance of Benefits.*—Act March 7, 1905 (24 St. at Large, p. 962), providing that the acceptance of benefits by an injured employee of an employer maintaining a relief department for employees shall not bar a recovery for the injuries sustained, is not an unreasonable interference with the right of contract, and is not violative of the fourteenth amendment of the federal Constitution or Const. art. 1, § 5.

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

Action by James A. Miller against the Atlantic Coast Line Railroad Company and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Best & Cunningham, L. D. Jennings, and J. H. Clifton, for appellant.

P. A. Willcox, Mark Reynolds, and L. W. McLemore, for respondents.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff on the 18th of October, 1909, in the discharge of his duties as engineer while in the employment of the defendant Atlantic Coast Line Railroad Company through its negligence and wantonness. The defendants denied the allegations of negligence and wantonness, and set up the defense

*For the authorities in this series on the subject of the validity of such statutory provisions, see *Chicago, etc., R. Co. v. McGuire* (U. S.), 38 R. R. R. 430, 61 Am. & Eng. R. Cas., N. S., 430, affirming 138 Iowa, 664, 21 R. R. R. 390, 44 Am. & Eng. R. Cas., N. S., 390 (constitutionality of amendment of Iowa Code, § 2071, providing that when a railroad is sued on its liability under such section, it is precluded from making the defense that a recovery is barred by the acceptance of benefits under a contract of membership in a relief department); *Mumford v. Chicago, etc., Ry. Co. (Iowa)*, 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431.

For the authorities in this series on the subject of the police powers of a state over railroad companies, see last paragraph of second foot-note of *Railroad Comm'rs v. Atlantic C. R. R. Co. (Fla.)*, 40 R. R. R. 497, 63 Am. & Eng. R. Cas., N. S., 497; foot-note of *Norfolk & W. Ry. Co. v. Dixie Tobacco Co. (Va.)*, 40 R. R. R. 191, 63 Am. & Eng. R. Cas., N. S., 191; last paragraph of foot-note of *State v. Chicago, etc., Ry. Co. (Minn.)*, 40 R. R. R. 131, 63 Am. & Eng. R. Cas., N. S., 131; *Atlantic C. L. R. Co. v. State (Ga.)*, 39 R. R. R. 672, 62 Am. & Eng. R. Cas., N. S., 672; *St. Louis, etc., Co. v. State (Okla.)*, 39 R. R. R. 646, 62 Am. & Eng. R. Cas., N. S., 646.

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that the plaintiff and said railroad company entered into a contract, whereby it was agreed that the plaintiff should become a member of its relief department, and receive a specified sum in case of injury, which sum when accepted by the plaintiff should operate as a release of all claims against the railroad company arising out of said injury; that the plaintiff in pursuance of said contract accepted the sum to which he was entitled as a member of the relief department, and thereby released the railroad company from all further liability for said injury. The plaintiff, replying to this defense, alleged that the said contract was null and void, and in contravention of the act entitled, "An act to regulate and fix the liability of railroad companies having a relief department, to its employees," approved the 23d of February, 1903, and which was as follows: "That from and after the approval of this act, when any railroad company has what it usually called a relief department for its employees, the members of which are required or permitted to pay some dues, fees, moneys or compensation to be entitled to the benefits thereof; upon the death or injury of the employee, a member of such relief department, such railroad company, be, and is hereby, required to pay to the person entitled to the same, the amount it was agreed the employee or his heirs at law should receive from such relief department; the acceptance of which amount shall not operate to estop, or in any way bar the right of such employee, or his personal representatives, from recovering damages of such railroad company, for injury or death caused by the negligence of such company, its agents or servants, as now provided by law; and any contract or agreement to the contrary shall be ineffective for that purpose." 24 St. at Large, p. 79. Also of the act entitled, "An act to fix and declare the liabilities of any corporation, firm, or individual operating a relief department, to employees, and to regulate the operation of the same," approved the 7th of March, 1905, and which was as follows:

"Section 1. That when any corporation, firm or individual runs or operates what is usually called a relief department for its employees, the members of which are required or permitted to pay fees, dues, money or other compensation, by whatever name called, to be entitled to the benefit thereof, upon the death or injury of the employee, a member of such relief department, such corporation, firm or individual, so running or operating the same, be, and is hereby, required to pay to the person entitled to the same the amount it was agreed the employee, his heirs or other beneficiary under such contract, should receive from such relief department; the acceptance of which amount shall not operate to stop, or in any way bar the right of such employee or his personal representatives, from recovering damages of such corporation, firm or individual, for personal injury or death caused by the negligence of such corporation, firm or individual,

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their servants and agents, as are now provided, by law; and any contract or agreement to the contrary, or any receipt or release given in consideration of the payment of such sum, is and shall be null and void.

"Sec. 2. That all acts inconsistent with this act are hereby released." 24 St. at Large, p. 962.

It appears from the testimony that the plaintiff became a member of the relief department on the 19th of November, 1904, and was still a member when he accepted the amount hereinbefore mentioned. The several drafts delivered to the plaintiff by the relief department after he sustained said injury (omitting dates and amounts) contained these words: "This amount is in payment of benefits for accident disability, for ——— days from ——— to ——— inclusive, and is paid and accepted under the regulations of the relief department." At the close of the testimony, the defendants made a motion for the direction of a verdict, on the ground "that the acceptance by the plaintiff of the benefits under the relief department contract operates as a bar, and as a complete defense to the action, the acceptance of such benefits having operated as a full release, satisfaction, and accord of any right of action that the plaintiff might otherwise have."

His honor, the presiding judge, sustained the motion, and assigned the following reasons for his ruling: (1) Because the act of 1903 was repealed by the act of 1905. (2) Because the act of 1905 was passed subsequent to the time when the plaintiff had become a member of the relief department, and that it was therefore inapplicable to the facts of this case. (3) Because the acts of 1903 and 1905 were in violation of the fourteenth amendment of the federal Constitution, which provides that "no state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction, the equal protection of the laws;" also, that the said acts were repugnant to section 5, art. 1, of the state Constitution (which contains a provision in similar language), on the ground that they were an unreasonable restraint upon the liberty of contract.

The plaintiff appealed from the order directing a verdict, and the first question that will be considered is whether his honor, the presiding judge, erred in ruling that the act of 1903 was repealed by the act of 1905.

[1] The act of 1903 was intended to apply solely to railroad companies, while the act of 1905 was intended, not only to embrace railroad companies, but "any corporation, firm or individual." This is the only difference in the two acts, except a slight variance in their phraseology. It is true the act of 1905 contains the provision that all acts inconsistent with it are repealed, but it cannot be successfully contended that the act of 1903 is incor-

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sistent with it, since all the provisions of the first are included within the second act. Therefore the act of 1903 was not repealed in express terms, and, if repealed at all, it was merely by implication. Repeals by implication, however, are not favored, and in this case such a rule cannot be successfully invoked. *Buchanan v. State Treasurer*, 68 S. C. 411, 47 S. E. 683. The exception raising this question is sustained.

[2] The next question for consideration is whether the presiding judge was in error, when he ruled that the act of 1905 was inapplicable, for the reason that it was approved after the plaintiff and the defendant railroad company had entered into the contract, whereby the plaintiff became a member of its relief department. This act was intended to have a prospective effect in those cases where its provisions were violated after its passage; and the fact that the contract out of which such violations arose was made before the act went into effect does not prevent it from being applicable. The police power is paramount to the liberty of contract; and, when it is determined in a particular case that a statute is not an attempt to exercise that power arbitrarily, then it cannot be successfully contended that it is an unreasonable restraint upon the liberty of contract. The following language used by the writer of this opinion, in the case of *Sturgiss v. Railway*, 80 S. C. 167, 60 S. E. 939, 61 S. E. 261, throws light upon the evil, which the act of 1905 was intended to remedy, and shows that it was not an attempt to exercise the power of police in an arbitrary manner: "The statute under consideration (act of 1905) was enacted for the purpose of preventing railroad corporations (and other parties therein mentioned) from inaugurating schemes, the ultimate aim and practical effect of which are to enable the railroad company to bring such influence to bear upon its employees as will force them to surrender their claims for damages when they have sustained injury through the negligence of the company, against which it is not allowed by law to contract. When the regulations of the hospital and relief fund are analyzed, it will be seen that they contemplate the result just mentioned. Not only do they provide that the employee who has paid his assessments, and thereby contributed to the creation and maintenance of said fund, shall be barred from recovering damages for negligence, if he accepts the benefit thereunder, but they likewise provide that his representative shall not be allowed to bring an action for damages caused by the negligence of the corporation, if they accept the benefit of said fund. Membership in the hospital and relief fund creates the relation of trustee and cestui que trust between the company and the employee, and, although the employee is assessed to maintain the fund, he is not allowed to receive a dollar of the money collected for that purpose, unless he surrenders his claim for damages, when he has been injured through the negligence of the corpora-

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tion. The fiduciary relation established between the company and the employee places him practically at the mercy of the corporation; for it is a well-known fact that the employees are not persons generally of large means, and frequently are dependent entirely upon their salary or wages for a support. What is the condition of the employee when he is injured through the negligence of the company? He realizes the fact that he has a beneficial interest in a trust fund, and, being in need of the money, he is anxious to get it. He is informed, however, that he must surrender all other claims against the corporation. At this time he, perhaps, is suffering great mental and physical pain, his mind is not so clear as when in health, and the opportune time contemplated by the corporation has arrived when he can be easily persuaded to relinquish his claim for damages arising out of negligence. Public policy demands that the corporation shall not have the opportunity of taking advantage of its employees through the fiduciary relations established between them with that end in view. We only desire to say in conclusion that, if the hospital and relief fund is successfully operated, the practical result will be that the railroad company will be enabled to liquidate claims for damages arising out of its negligence, with sums of money contributed in the main by its employees—an indirect way of contracting against its negligence."

To the same effect is the following language of the court in *McGuire v. Railway*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706: "The average railway employee is not a man of wealth. More often than otherwise, his total possessions, if any, are represented by a modest home, and he depends upon his wages to meet his current living expenses. If he has a family, they, too, are dependent upon his earnings. If severely injured, the pain from his wounds, the anxiety for his dependent family, the pressure of his immediate needs, are not conducive to calm and businesslike reflections upon what may prove to be a matter of great importance to him and those who look to him for support. The immediate aid which the relief department offers may under such circumstances assume an exaggerated importance to his eyes, and in his weakness and distress, lead him to accept a benefit inferior to that which he might otherwise be entitled to recover. Moreover, the Legislature may well have believed that, while membership in the relief department was entirely voluntary in the legal sense of the word, it was still possible for the employer, by making the tenure of service more secure to those who became members, to bring to bear an influence in that direction, savoring of moral coercion." These views are recognized in the case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, in which the following language is used: "The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establish-

ments and their operatives do not stand upon an equality, and that their interests are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may properly interpose its authority. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and, when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.' " The case of *Railway v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, shows that the act of 1905 cannot be construed as an arbitrary exercise of the police power; and that the fact that the contract was made before its passage does not render it inapplicable in this case.

The exception raising this question is sustained.

[3, 4] The last question to be determined is whether the presiding judge erred in ruling that the acts were obnoxious to the fourteenth amendment of the federal Constitution, and to section 5, art. 1, of the state Constitution, on the ground that they are an unreasonable interference with the right of contract. Before proceeding to determine this question, we desire it understood that the proposition whether the provisions of said acts would be regarded as in restraint of the right of contract if parties enter into a new and independent contract subsequent to the injury, but during the time the injured party is a member of the relief department, is not before the court, and, of course, will not be adjudicated. The very able opinion of Mr. Justice Hughes in *Railway v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, is conclusive of the question now under consideration; and, as this court must conform its decisions to those of that court on federal questions, we will quote somewhat at length from the opinion in that case, as follows: "The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this respect that the question arises as to the restriction of the liberty of contract. * * * There is no absolute freedom to do as one likes, or to contract as one chooses. The guaranty of

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liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern. * * * It is subject, also, in the field of state action to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. * * * The principle involved in these decisions is that where the legislative action is arbitrary, and has no reasonable relation to a purpose, which it is competent for government to effect, the Legislature transcends the limits of its power in interfering with the liberty of contract; but, where there is reasonable relation to an object within the government authority, the exercise of the legislative discretion is not subject to judicial review. * * * If the Legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and, if the power exists to accomplish the latter, the interference is justified, as an aid to its exercise. * * * Having authority to establish this regulation, it is manifest that the Legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power the Legislature was not limited, with respect either to the form of the contract or the nature of the consideration, or the absolute or conditional character of the agreement. It was as competent to prohibit contracts which on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability, which would otherwise exist, as it was to deny validity to agreements of absolute waiver. * * *

If the Legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment under the contract? The asserted distinction is sought to be based upon the fact that under the contract of membership the employee has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts in any case where it exists necessarily implies legislative control over the transaction in spite of the action of the parties. Whether this control may be

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exercised in a particular case depends upon the relation of the transaction to the execution of a policy, which the state is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the Legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and HYDRICK, J., concur.

WOODS, J. I concur on the authority of *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328.

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(Supreme Court of Michigan, Dec. 29, 1911.)

[133 N. W. Rep. 993.]

Master and Servant—Injuries to Servant—Negligence.—Where, if the rules had been observed, no injury could have occurred from routing a departing train over a certain track, the train dispatcher was not guilty of negligence, for he had the right to assume that the other servants of the railroad company would observe such rules.

Master and Servant—Injuries to Servant—Rules—"Train."—A bulletin directing all trains to use the right-hand track applied to a light engine; the word "train" being defined in the book of rules as an engine or more than one engine coupled, with or without cars.

Master and Servant—Injuries—Actions—Questions for Court.—The construction of the written rules of a railroad company is a question for the court.

Master and Servant—Injuries to Servant—Rules—Abrogation of Rules.*—Unreported violations by engineers of a rule of a railroad company, the violation of which was made a criminal offense by statute, was insufficient to show an abrogation of such rule by the company, the officers of which kept them printed in a prominent place.

Master and Servant—Contributory Negligence—Violation of Rules.†—A railroad engineer who violates a subsisting rule relating to the

*See first foot-note of *Gilborne v. Oregon S. L. R. Co.* (Utah), 41 R. R. R. 86, 64 Am. & Eng. R. Cas., N. S., 86; last foot-note of *Pike v. Cedar Rapids, etc., Ry. Co.* (Iowa), 41 R. R. R. 445, 64 Am. & Eng. R. Cas., N. S., 445.

†See last foot-note of *St. Louis, etc., Ry. Co. v. Webster* (Ark.), 41 R. R. R. 687, 64 Am. & Eng. R. Cas., N. S., 687; *Pounds v. Chi-*

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operation of trains cannot recover for injuries resulting from such violation, though the engineers of the defendant, without its knowledge, were in the habit of disregarding such rule.

Evidence—Calling Witnesses of Adverse Party—Effect of Testimony.—Where a plaintiff, under Pub. Acts 1909, No. 307, providing that parties, when they call the opposite party or his employees, shall have the right to cross-examine such witnesses as if they were called by the opposite party, and the answers of such witnesses shall not interfere with the rights of the party calling them to introduce evidence upon any issue involved in the suit, called employees of defendant as witnesses, they did not become defendant's witnesses, but were plaintiff's witnesses, and their testimony was binding on him, unless he succeeded in contradicting it in the manner provided by the statute.

Blair and Moore, JJ., dissenting.

Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Action by Clarence A. Jones against the Pere Marquette Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Argued before OSTRANDER, C. J., and MOORE, McALVAY, BROOKE, BLAIR, STONE, and STEERE, JJ.

Bills, Streeter & Parker (Charles E. Ward, of counsel), for appellant.

Charles G. Turner and M. A. Nichols, for appellee.

OSTRANDER, C. J. The plaintiff, formerly a railroad engineer on the defendant's railroad, was injured in a collision between his engine and a passenger train known as No. 8, running between Grand Rapids and Chicago. The collision occurred in defendant's yard near Grand Rapids, known as "Wyoming yard." Defendant's track was a double main track, running southerly from Godfrey avenue or thereabouts at Grand Rapids through Wyoming yard to a point where the Lake Shore road crosses defendant's road. Beyond that it was a single track. A double-track main also existed on the Detroit branch, extending from Oakland to or near Oakland avenue, where it connected with the Chicago line. A Y extended from the Detroit line to a switching station, known as "Sunny Side," upon the Chicago line, over which freight trains on or for the eastern branch go to and from the Wyoming yard, which was located a mile or so southwest of Sunny Side. A half a mile or more southwest from Sunny Side, and at the north en-

cago Great Western Ry. Co. (Minn.), 41 R. R. R. 437, 64 Am. & Eng. R. Cas., N. S., 437; second foot-note of *Gilbourne v. Oregon Short Line R. Co.* (Utah), 41 R. R. R. 86, 64 Am. & Eng. R. Cas., N. S., 86; *Louisville & N. R. Co. v. Murphy* (Ky.), 40 R. R. R. 632, 63 Am. & Eng. R. Cas., N. S., 632.

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trance of Wyoming yard, was another switchman's station, known as "Plaster Creek." Wyoming yard extended a mile south of Plaster Creek, and a short distance south of the south entrance to the yard, perhaps a quarter of a mile or more, was the Lake Shore crossing. At each end of the yard, and also at the Sunny Side, was a cross-over, used for engines and trains to cross from one main to the other. The rule of the road was to use the right-hand main. All trains going south were expected to take the westerly track and north-bound trains the easterly track. On the night of the collision plaintiff approached Sunny Side from the east about 11:35 p. m., and this was five minutes after the regular time for No. 8 to leave Grand Rapids for Chicago, which he knew, and he also knew that No. 8 had the right of way over his train. He accordingly inquired of the switch tender where No. 8 was, or if it had gone, or made some other similar inquiry, and was informed that No. 8 was not going over this road that night, but was going to detour over the Grand Rapids & Indiana and Michigan Central, owing to a washout at Saugatuck, some 40 or more miles southwest of Grand Rapids. He accordingly proceeded. The switch was thrown, and he entered upon the north-bound main, protected in crossing from both ways by the target, which, when thrown, showed to all trains on the main line that such mains were blocked. Knowing that they were upon the time of No. 8, and having no written order in relation to No. 8, his train after crossing the north-bound main to the south-bound main proceeded south with due caution; i. e., the conductor stood on the rear platform with the proper lights and fuses as required by rule 99, ready to use the same upon the appearance of any train following. Plaintiff proceeded down to Plaster Creek, expecting to then take a switch at the north end of Wyoming yard. The Plaster Creek switchman stopped him, and gave him information that the yardmaster directed that he go south through the yard and back in on a switch, and this he did, and the switchman testified that he watched his rear lights all the way down, and saw that he backed in, "clear." While he was executing this maneuver—i. e., backing in—the target at the south end was thrown by his brakeman or the yardmaster, thus protecting him against trains from both directions, as it indicated that the mains were blocked. His train being safely on the switch, it remained for him to take his engine to the roundhouse. He therefore backed out onto the south-bound main, and, had he followed the rule to use the right main, would have run south about three car lengths to the cross-over, and gone over that to the north-bound main, which the yardmaster expected him to do, as he said he would set the target on that main against any train from the west. Instead of doing so, after getting clear of the switch, plaintiff started north on the south-bound main. His conductor had left the rear of the train and started to walk up to

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the Wyoming office, situated about midway of the yard, taking the south-bound main to avoid the danger of being run down by any engine or train from the south, upon the assumption that only south-bound engines or trains would be on that track. He had a narrow escape from being run down by plaintiff's engine. Meantime No. 8 had received no order to detour, but, instead, a clearance order over defendant's own road, and, although plaintiff saw the headlight coming, he supposed it was a dummy that made regular trips to Wyoming station, and kept on. This resulted in a collision, in which both engines were wrecked, plaintiff was injured, his fireman killed, and one or more of the crew of the passenger engine and several passengers were injured. An inquest was held over the remains of plaintiff's fireman, and he was a witness, and stated one or more times, in describing how the accident occurred, that he was on the wrong main, and was run into by No. 8, which he had supposed was going to detour. Afterwards plaintiff brought this action and recovered a verdict and judgment for \$15,000 for his injuries, and the defendant has appealed.

If the foregoing statement were all there is to this case, it would seem that, not only was the plaintiff guilty of contributory negligence, but that there would be more reason for his being before the court as a defendant than plaintiff at the suit of all of the injured members of the two train crews and passengers, if he was fortunate enough, as he seems to have been, to avoid a charge of manslaughter, as it clearly appears that he deliberately violated the written rule of the company in proceeding north with his engine on a south-bound main, knowing both the rule and the fact that he was on the time of No. 8 south bound, which he knew was, as the sequel proved, a most hazardous thing to do under ordinary, or for that matter unusual, circumstances, against which the rule was plainly designed to provide and protect, and for which violation he was liable to a fine of \$25 and three months' imprisonment under the general laws of this state, "and any conductor, engineer, servant or other employee of any such railroad corporation who shall knowingly violate any of the printed or written rules or regulations of such company, shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars, or to an imprisonment in the county jail not more than three months, or both such fine and imprisonment, in the discretion of the court" (Comp. Laws 1897, § 6286), of which he was advised by the book of rules in his possession. The excuse made for his misconduct was his own convenience in avoiding the delay of having a few switches thrown and the alleged custom of disobeying or disregarding the rule that all trains should use the right-hand main, together with his belief that No. 8 would detour, upon which belief the rules clearly forbade his

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relying without taking the precautions provided and required by rules and bulletins.

The negligence alleged and relied on is that the train dispatcher, after informing the yardmaster that No. 8 would detour, sent the train out from Grand Rapids some 35 or more minutes later without first notifying the yard office of his intention to do so. The plaintiff could not have known it had this been done, as he and the yardmaster were half a mile from the office at that time.

The undisputed facts are: That for several days a weak bridge at Saugatuck, some 40 or more miles west of Grand Rapids, had made it necessary to detour No. 8 via Grand Rapids & Indiana and Michigan Central roads; and, while on this evening orders were given to hold No. 8 for a time in the hope that it might avoid the detour, it was expected that the train would detour. Knowing that No. 8 had detoured on previous days and with a view to the entrance of plaintiff's train, which he expected to arrive soon, the yardmaster telephoned the dispatcher to know what was to be done with No. 8, and was informed that it would detour. This was about 11:15. He thereupon informed the switchman at Plaster Creek of the fact, and directed him to inform plaintiff not to take the switch at the north end of the yard, but to proceed south through the yard and back in from the south. We have seen that the switchman at Sunny Side was also informed that No. 8 would detour. Hence he informed plaintiff, and he proceeded via south main to the south end of the yard by direction of the Plaster Creek switchman, where he found the yardmaster awaiting him. He entered upon the south-bound main at 11:35, being about five or ten minutes before the regular time for No. 8 at Sunny Side by direction of the yardmaster through the switchman. Meantime No. 8 was being held in the hope that she might proceed via the Pere Marquette line, and at about 11:50 clearance orders were given, and the train departed with the result above stated. We must therefore inquire whether this was negligence in the train dispatcher.

[1] The proposition is that, having stated to the yardmaster that No. 8 would detour, it was negligent to send the train out without informing the yardmaster of the change before doing so. This will depend upon the printed rules and bulletins and the practice of the road and what the dispatcher had a right to understand and expect. The bulletins and rules were in writing, and the plaintiff, yardmaster, and switchman all had copies of the latter. Their meaning was a question for the court, and a large amount of opinion evidence as to their meaning was erroneously admitted. The dispatcher had a right to expect that the rules and bulletins would be obeyed by all. Assuming that he knew when he told the yardmaster at 11:20 that the train would detour that the yardmaster would admit plaintiff's extra freight

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into the yard on the time of No. 8, which he did at 11:35, he knew that, if the rules should be obeyed, the only thing that could happen would be the delay to No. 8 which might be caused thereby. The reason for saying this is that he knew that No. 8 could not pass the Sunny Side switch without the signal required to be given by the switchman, who would be acting under rules 590 and 591, and would not "give the proceed signal unless all was right." He knew, also, that the same would be true at the Plaster Creek switch. Furthermore, he knew that, in the event of the failure of the switchman to block No. 8 if necessary, the plaintiff's train would be protected by its conductor under rule 99, as was done, and that in executing the switching movement at the south end of Wyoming yard the plaintiff's train would be protected by the south board, which it was the engineer's duty to cause to be displayed until he was "in clear" on the switch. So far the plaintiff had acted in obedience to the rules and the directions of the yardmaster, and no harm had befallen him. The Plaster Creek switchman, who could see the entire length of the yard, had seen his lights go off from the main line before No. 8 passed his switch. His conductor had stood at his post, fuses in hand, and lamps burning, until the train was out of danger. Then, his work done; he started for the yard office, leaving the engineer to take his engine to the roundhouse, which he could have done without going upon the main track, or by way of the north-bound main, under protection of the yardmaster. At this point he departed from the rules. It is a significant fact that there is no evidence that any other engine was on either main, not even a yard engine. All were "in clear" because they were on the regular time of No. 8. Even the dummy, which was scheduled to run every 40 minutes or so, was safely side-tracked, awaiting No. 8 or such other train as might be sent out on her time; for, if No. 8 detoured, it would leave the towns between Grand Rapids and Saugatuck without train service unless another train should be sent over that portion of the road, as was sometimes done where trains detoured. It is manifest that, if the rules were obeyed, the dispatcher would have a right to assume that any train going south would be under protection, and that no train would be coming north on a south-bound main on the time of No. 8, and it is clear that, having a right to proceed on the theory of obedience to the rules, he cannot be said to have been negligent in giving a clearance order at 11:55 without first calling up the yard office, and seeing that the west main was clear. See *Veit v. Ann Arbor R. Co.*, 150 Mich. 366, 114 N. W. 236, where we said: "The train dispatcher was not chargeable with notice that if the crew of No. 42 returned to Mesick, as he expected they might, they would disregard the well-understood rules made largely for the protection of their own lives. He had a right to rely upon the observance of the rules by the trainmen,

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and to give his orders upon that basis. There is no evidence in this case to affect the right of the dispatcher to rely upon an observance of the rules, without which reliance he could not conduct the train movements of the road." See, also, *Enright v. Railway Company*, 93 Mich. 409, 412, 413, 53 N. W. 536; *Whalen v. Mich. Central R. Co.*, 114 Mich. 512, 524, 72 N. W. 323.

[2] Plaintiff's counsel appear to have recognized the force of this, and, to avoid such conclusion, attempt to convince the jury, first, that these bulletins did not apply to light engines because they mentioned trains only and engines were not trains and therefore there was nothing prohibiting such engines from using the left mains; and, second, that this engineer did not violate the bulletin because he did use the right-hand track when taking his train through the yard, and it was the same track when he returned with the engine, and therefore he was still using that same right-hand main. That the word "trains" included light engines other than yard engines appears from the first definition in the book of rules, viz.: "Train—An engine, or more than one engine coupled, with or without cars; displaying markers." The other proposition requires no discussion. The main contest, however, centers in the claim that, by reason of the custom, the plaintiff had the right to go north on the south-bound main on the time of No. 8, believing that it would not run.

[3, 4] We have examined the rules and bulletins, and we hold, first, that they are to be construed by the court and opinion evidence as to what they meant was not admissible; second, that under these rules No. 8 was not annulled by the telephone message to the yardmaster, or in any other way, and the plaintiff had no right to consider it so; third, that, whether supposed to be annulled or not, the bulletins forbade plaintiff to run his engine north on a south-bound main on the time of a regular train, or, for that matter, at any time; fourth, the evidence, such as it was, that it was the custom to run trains north on the south-bound mains, consisted of the following: (a) The yard engines were used on both mains in both directions. This was permitted under the direction of the yardmaster when not on the time of regular trains and they were properly protected. (b) The dummy ran from near Union Station to Wyoming yard station on the south-bound main. There being no cross-over at that point, it backed up to the cross-over at Plaster Creek. Both of these were allowed by authority, and cannot be considered as an abrogation of the general rule that "trains will use the right-hand track" and run with the course of traffic. (c) Testimony of the plaintiff and one or two other witnesses that they had seen passenger and freight engines take the left-hand track to go to the roundhouse. This testimony was meager, and was contradicted by several witnesses who were in a position to know. It did not justify an inference that the defendant knew and consented to

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the abrogation of this general rule, leaving engineers and trainmen to use either track at will. It is inconsistent with the object of a double track. Moreover, it appears that those bulletins are kept posted in conspicuous places, and the rules require that they be read by the engineers before every trip. Again, a man was employed whose duty and business it was to instruct new men as to the rules and bulletins. Again, the plaintiff admitted that he knew it was his duty to report infractions of these rules, and he did not do it when he saw them, thereby indicating the bad faith of all these claims. We should grant a new trial if for no other reason than that the judgment was contrary to the evidence.

The plaintiff's case reached a point upon the trial where it was made to turn on the proposition that the rule requiring engineers to use the right-hand main was abrogated by the tacit assent to a custom so common and general as to justify the conclusion that the managing officer having the making and abolition of rules knew of and approved the violation. Counsel for plaintiff cite the case of *Fluhrer v. Lake Shore R. Co.*, 121 Mich. 212, 80 N. W. 23, as sustaining the rule upon which they rest this point. That was a case where a brakeman was injured in coupling cars. Mr. Justice Grant there said, with the approval of his associates: "It is well settled that a violation of the rules of the company will defeat recovery. The exception to this is where the company itself has sanctioned the custom of its employees to act in violation of the rules, and has thus virtually abrogated them. This exception is based upon the theory that it would be unjust in employers to establish rules, and then sanction their violation, and interpose such violation as a defense. *Hunn v. Railroad Co.*, 78 Mich. 513, 526 [44 N. W. 502], 7 L. R. A. 500; *Eastman v. Railway Co.*, 101 Mich. 597, 602 [60 N. W. 309]. Fairly construed, the above rule is notice to brakemen not to enter between the cars while in motion, to uncouple them, and an agreement not to do so. The danger in doing so is apparent. Only when this rule is violated by brakemen so universally and notoriously that it is a fair inference that the company sanctioned and approved the violation is the company barred from this defense. The court instructed the jury that if they believed that the motion of the cars was so slow that it was not negligence to pass between them to uncouple them, and that such was the usual custom of brakemen under like circumstances, then such act would not necessarily prevent recovery by the plaintiff. There was evidence tending to show that it was usual and customary for brakemen to pass between the cars while in motion to uncouple them. The case was not submitted to the jury upon the theory that the company had sanctioned a violation of this rule. The question was not referred to in the instructions. Under the instructions given, this rule was virtually thrown out of consideration, and the jury permitted to find that, if it was customary for brakemen to do

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this, then it was not negligence on the part of the deceased. Custom alone is not sufficient. It was held in *Glover v. Scotten*, 82 Mich. 369 [46 N. W. 936], that where a safe place was provided for switchmen to ride, and they chose to ride in a more dangerous one, and always did so, that would not relieve them from contributory negligence. When the defendant had entered into the contract with the deceased, in which he acknowledged the receipt of a copy of these rules, and agreed to abide by them, it had met the plaintiff's case, even though it was not negligence per se to go between the cars when in motion. The onus probandi was then cast upon the plaintiff to show that the company sanctioned a departure from the rule by a custom so universal and notorious that the company was presumed to have had knowledge of it and to have ratified it."

The latter case of *Nichols v. Chicago, etc., Ry.*, 125 Mich. 394, 84 N. W. 470, was reversed for the reason that the court erred in his instruction upon this subject. In the case of *Ball v. Hauser*, 129 Mich. 401, 89 N. W. 50, we said: "Whatever we might conclude were it necessary to pass upon the question, it is apparent from the cases cited that even in railroad cases recovery is permitted only when the testimony shows that the rule has been abrogated, and this may be inferred from the circumstances fairly establishing it. If that rule should be applied to this class of cases, we must inquire whether this proof warrants such a conclusion. The plaintiff claims that his proof does warrant it, because he has shown by testimony that some of the men have been in the habit of riding on the elevator; that one of the defendants had seen it done without remark; that he rode on the elevator himself; and that in taking up some kinds of freight it was necessary that a man should ride. The fact that some of the men rode down upon the elevator, even if occasionally seen by the defendants without remark, is not inconsistent with the claim that said rule was relied on, and not abrogated. Neither does the fact that one of the defendants rode upon it indicate an intention to permit the men to do so. Nor does the fact that it was necessary for men to ride up occasionally with bulky articles, if it was necessary, establish the abrogation of the rule. Even if it could be said to justify the plaintiff in riding up, it does not tend to show a consent that he should unnecessarily ride down in violation of the rule, which he must have understood from the notice, and which, if the testimony of other witnesses is true, he was repeatedly warned against doing. We think the testimony offered does not establish the claim that the defendants sanctioned such use of the elevator. Not only does this testimony not prove it, but much evidence tends to disprove it. The defendants are not shown to have found it necessary to send men up on the elevator with their materials, or that they expected that

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Nordella & Owen would do so. They stationed a man at the top to receive material, a part of whose duty it was to warn men against riding down, which he is shown to have done repeatedly. The engineer below performed a similar duty at defendants' direction; and the defendants at different times told men not to ride upon the elevator. The witness Brogden says that he repeatedly told Ball to keep off from it, and that he was in the habit of jumping on while it was in motion. It was the general custom for the men to go up and down on the ladders provided for the purpose. None of these things was disputed, except that Ball denies being warned to keep off, thereby contradicting several witnesses. This denial raised a question of fact as to that point, and we must, therefore, assume that he was not warned; but that, and the fact that he and others sometimes rode, do not prove that the rule was abrogated by defendants' sanction, nor did it warrant the judge's leaving the question to the jury. The undisputed proof shows that the defendants were insisting upon their rule. It was not their duty to hire men to warn others not to disobey a known direction; yet they did it. One warning would ordinarily be enough; yet these defendants not only kept the printed notice up, and men to enforce it at each end of the route, but themselves sometimes reproved men who still persisted in riding. An employer ought to have some rights which his employees are bound to respect. There is nothing to compel them to afford elevator transportation, or to preclude their providing for carrying freight to the exclusion of passengers without being liable to such as shall insist on riding in violation of instructions."

[5] In the present case, as in that, there was an absence of testimony that defendant's officers who manage and make rules knew or ever heard of any violations of the rule. They persisted in handing out their rules and keeping the bulletins posted, and, as in the other case, they kept a man whose duty it was to see that they were obeyed so far as possible. There was a failure to show an abrogation of this rule, and the court should have so instructed the jury.

The law requires the making of regulations and rules by railroads. It punishes men who disobey them by fine and imprisonment. It is a startling proposition to men who travel on railroads that a regulation requiring engineers to observe the common rule of the road and keep to the right track may be disobeyed with impunity whenever an employee may have reason to think a particular train will not run, and not only that, but, after causing the death of one, painful injury to several, and wrecking his employer's property and subjecting it to the payment of damages to its passengers, he may still sue the employer and recover large damages upon the theory that his criminal disobedience was invited by reason of the employer's failure to anticipate and pro-

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vide against it by taking him into its confidence, to the general demoralization of its business. Railroading is a matter of minutes and seconds. A dispatcher's office must depend upon rules and the obedience of station agents, telegraphers, engineers, conductors, and switchmen. Great care is taken to protect the public against the consequences of disobedience or mistake. The rules do not permit an engineer to go unprotected on the time of a regular train, even though he has reason to believe it will not run. He is still required to protect against accident by obeying the rule, and it is made criminal to do otherwise. Written rules of railroad companies cannot be treated as abrogated by such railroad companies on testimony tending to show nothing more substantial than insubordinate and unreported criminal disobedience on the part of some of the employees. This is simply a case of "taking a chance," whereby many others "were made to take chances."

[6] There is another question that we refer to, not because it is necessary to a disposition of this case, but because it has arisen in other cases. It involves the statute (Act No. 307, Pub. Acts 1909), which provides.

"An act to authorize parties litigant, when they call as witnesses in their behalf the opposite party, employee or agent of said party, to cross-examine such witnesses, and providing that they shall not be bound by their answers."

"The People of the State of Michigan enact:

"Section 1. Hereafter in any suit or proceeding in any court of law or equity in this state, either party, if he shall call as a witness in his behalf the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true."

It was the claim of the plaintiff's counsel that, under this statute, they were entitled to call as witnesses any persons who were in the employ of the defendant at the time of the accident, and obtain the benefit of their testimony without being bound by it. They insisted that the witnesses so called were not their witnesses, but the defendant's witnesses, and that any testimony given by them was not a part of the plaintiff's case except in so far as plaintiff wished to make it such. Relying on this theory, they called witnesses Perry, Lawless, Venneman, Bays, Hibner, and Snyder. The title would seem to be enough to show that these

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were not to be called as defendant's witnesses. They are there referred to as employees or agents of the opposite party and as witnesses called in behalf of the party calling them. The act allows such witnesses to be cross-examined and contradicted by the party calling them. The provision that such calling shall not interfere with their right to contradict or deny the truth of their statements conferred no new right. This act does not give the right to make them the witnesses of the adversary of the party calling them.

We have gone carefully over the record and briefs of counsel, and are constrained to say that defendant has not been shown to be negligent, that plaintiff was negligent in his disobedience of the rules of the road, which was the sole cause of his injury, and, being fully convinced that under no theory can plaintiff ever justly recover damages growing out of this transaction, the judgment is reversed, and a new trial is denied.

BIRD, J., ill, takes no part in the decision.

STEERE, MCALVAY, BROOKE, and STONE, JJ., concurred with OSTRANDER, C. J.

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(Supreme Court of Wisconsin, Jan. 30, 1912.)

[134 N. W. Rep. 364.]

Master and Servant—Injury to Servant—Master's Liability—Want of Ordinary Care.*—To make a master liable for injury to an em-

*For the authorities in this series on the subject of the degree of care required of a master in furnishing appliances, see second paragraph of second foot-note of *Ingram v. Louisville, etc., R. Co.* (La.), 41 R. R. R. 457, 64 Am. & Eng. R. Cas., N. S., 457; foot-note of *Delaware, etc., R. Co. v. Troxell* (C. C. A.), 40 R. R. R. 326, 63 Am. & Eng. R. Cas., N. S., 326; first paragraph of first foot-note of *Atlantic Coast Line Co. v. Linstedt* (C. C. A.), 40 R. R. R. 318, 63 Am. & Eng. R. Cas., N. S., 318; foot-note of *Kirby v. Chicago, etc., Ry. Co.* (Iowa), 39 R. R. R. 584, 62 Am. & Eng. R. Cas., N. S., 584.

For the authorities in this series on the subject of the degree of care required of a master in inspecting appliances, see third paragraph for last foot-note of *Ingram v. Louisiana, etc., R. Co.* (La.), 41 R. R. R. 457, 64 Am. & Eng. R. Cas., N. S., 457; eighth head-note of *St. Louis, etc., Ry. Co. v. Webster* (Ark.), 41 R. R. R. 687, 64 Am. & Eng. R. Cas., N. S., 687; last foot-note of *Louisville & N. R. Co. v. McMillen* (Ky.), 39 R. R. R. 591, 62 Am. & Eng. R. Cas., N. S., 591.

For the authorities in this series on the subject of the degree of care required of a master in furnishing and maintaining a safe work place, see last paragraph of last foot-note of *Ingram v. Louisiana, etc., R. Co.* (La.), 41 R. R. R. 457, 64 Am. & Eng. R. Cas., N. S., 457; first foot-note of *Henry v. Hudson, etc., R. Co.* (N. Y.), 41 R. R. R. 453, 64 Am. & Eng. R. Cas., N. S., 453.

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ployee for presence of electricity, when there should be none, in a span wire, from which trolley wires were suspended, its presence must have been the result of the master's want of ordinary care.

Electricity—Injuries Incident to Use—Liability—Ordinary Care.† —While greater care is required of one handling electricity than of one handling ordinary substances, the criterion of ordinary care, the test of actionable negligence, is the same; such care as the majority or great mass of mankind exercise under the same or similar circumstances.

Master and Servant—Injury to Servant—Negligence—Inspection. —The appliances being of approved pattern, and there being nothing in their appearance to indicate any defect, the master cannot be held liable for presence of electricity in a span wire, through defective insulation in hangers, by which trolley wires were suspended therefrom, unless its thorough inspection, twice a year, was not sufficiently frequent; which cannot be held, there being no evidence that hangers easily or frequently become defective, but the inference being to the contrary, and there being no evidence that more frequent inspection was customary with others.

Appeal from Circuit Court, La Crosse County; E. C. Higbee, Judge.

Action by David Doyle against the La Crosse City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

This is an action brought to recover for personal injuries sustained by the plaintiff while in the employ of the defendant, resulting from a fall from one of the defendant's trolley poles, which pole the plaintiff was preparing for the use of the defendant for trolley purposes. The negligence claimed by the plaintiff is that the defendant allowed a span wire, with which the plaintiff accidentally came in contact, to become charged with electricity, by reason of which the plaintiff received a shock which precipitated him to the ground. The defendant denied that the span wire was charged with electricity, and claimed that the plaintiff fell to the ground accidentally, or by reason of his own negligence. The plaintiff at the time of the accident, September 16, 1909, was an experienced lineman who had been engaged in electrical work in the construction of trolley lines and in other capacities for about 12 years. He had been employed by the defendant about 10 days

†For the authorities in this series on the subject of the definitions of actionable negligence, see second foot-note of *Basler v. Sacramento Gas., etc., Co.* (Cal.), 38 R. R. R. 554, 61 Am. & Eng. R. Cas., N. S., 554; second head-note of *Houston, etc., R. Co. v. Alexander* (Tex.), 38 R. R. R. 464, 61 Am. & Eng. R. Cas., N. S., 464; fifth head-note of *Heinz v. Baltimore & O. R. Co.* (Md.), 38 R. R. R. 172, 61 Am. & Eng. R. Cas., N. S., 172; last foot-note of *Illinois Cent. R. Co. v. O'Neill* (C. C. A.), 37 R. R. R. 99, 60 Am. & Eng. R. Cas., N. S., 99.

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prior to the time of the accident. The defendant owned and operated a double-track street railroad in the city of La Crosse, operated by an electric current of 550 volts, supplied by overhead trolley. The power house of the company was located immediately across the street from the pole where the accident happened. On the day of the accident the plaintiff was at work getting cross-arms ready for new poles, at about 8 o'clock in the morning, when the defendant's superintendent, Shaw, instructed him to put cross-arms on three or four poles on the east side of Third street, immediately opposite the power house. The plaintiff started about this task with a helper named Peterson. They commenced work upon the pole where the accident happened, which was nearly opposite the power house. This was a pole which had been recently put in place, and there were no cross-arms upon it. The only wire attached to it was a guy wire, which extended easterly to the ground. It was attached to the pole about 6 inches below the point where the lower cross-arm was subsequently placed by plaintiff. To the east of this new pole was an older pole, which was still in use, and supported the span wire in question, which extended across the street at this point and supported the trolley wires. This span wire was made of seven or eight strands of twisted galvanized iron, and passed the new pole about 4 inches away from and to the south of it, and about 4 inches below the point where the guy wire was attached to the new pole. From this span wire were suspended three insulated hangers, to which three trolley wires were attached. Two of these trolley wires seem to have been the wires over the tracks of the railway, and the other over the track which led into the house. The hangers or insulators by which the trolley wires were attached to the span wire were the Ohio Brass Company's hangers, and are supposed to be thoroughly insulated, so that the electric current cannot escape from the trolley wire to the span wire. The plaintiff was equipped with spurs and a safety belt, and mounted the pole to a point where he could conveniently handle the cross-arms, and put them in the gains which had been cut in the pole for the purpose. His assistant, Peterson, passed to him the cross-arms, and the plaintiff put them in position. While the plaintiff was putting the cross-arms in position, Peterson stood very near him upon the top of the elevated wagon called the "Jim wagon," which was used by the defendant in the repairing and construction of its lines, and the platform of which was about 16 feet from the ground. He had his arm over the span wire in question. After the plaintiff had placed the cross-arms in position and bolted them, he proceeded to pull the metal braces, which were upon the cross-arm, down in order to screw them in position. Before this work was accomplished, one Sewojski, the defendant's assistant superintendent, came to the place, and got on to the Jim wagon and told the plaintiff to stop his work there, and go to Onalaska, and cut off

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some wires upon a certain pole there, and leave Peterson to finish up the job he was then engaged in. The plaintiff testifies that he then took off his safety belt, put his right hand upon the guy wire, and reached up his left hand to the south cross-arm in order to see whether it was plumb with the north cross-arm, and that while he was doing this his left hand came in contact with the span wire, which was just in front of his breast, and an electric current gripped him, and that is all that he remembered until he woke up in the hospital. The fact is undisputed that he fell from the pole. The helper, Peterson, denies that the plaintiff touched the span wire, and says that he fell as he was starting to get down by reason of his spurs not taking hold of the pole. Plaintiff was very seriously injured.

The jury returned the following verdict. "Q. 1. Was the span wire in question charged with a dangerous current of electricity at the time that plaintiff was directed to work upon the pole from which he fell? A. Yes. Q. 2. If you answer question No. 1, 'Yes,' then was such condition of the span wire due to defective and insufficient insulation of one or more of the hangers supporting the trolley wire attached to such span wire? A. Yes. Q. 3. If you answer question No. 2, 'Yes,' then could the defendant in the exercise of ordinary care have discovered and repaired such condition before directing the plaintiff to go to work upon said pole? A. Yes. Q. 4. If you answer question No. 2, 'Yes,' then was such condition of the wire the proximate cause of plaintiff's injury? A. Yes. Q. 5. Was the plaintiff wanting in the exercise of any ordinary care which contributed to his injury? A. No. Q. 6. If the court shall finally determine that the plaintiff is entitled to recover, at what sum do you assess his damages? A. \$12,000." The court denied successive motions made by defendant for judgment notwithstanding the verdict, to change the answers to a number of the questions in the verdict, and enter judgment thereon as so changed, and to set aside the verdict and for a new trial, and rendered judgment on the verdict for the plaintiff, from which judgment the defendant appeals.

George H. Gordon and Woodward & Lees, for appellant.
Morris & Hartwell, for respondent.

WINSLOW, C. J. (after stating the facts as above). The plaintiff's claim is that he took hold of the guy wire with his right hand in order to assist himself upward, and that as he raised his left hand to adjust the cross-arm the hand came in contact with the span wire immediately in front of him, and that he received a shock of 550 volts, which gripped him, contracted his muscles, and then released him and let him fall to the ground. It is urged that this story is incredible; but we have not been able to come to that conclusion. It is true it was flatly denied by the evidence of the plaintiff's helper, Peterson, and it is true that the jury would have

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been amply justified in concluding from the evidence that the plaintiff fell from the pole without any electric shock; but we are not convinced that the plaintiff's version is impossible.

[1] Our difficulty has been to discover any justification for the finding that the defendant was guilty of negligence. Granting that there was in the span wire at the moment of the accident a 550-volt current of electricity which found its way to the ground through plaintiff's body, when he touched the span wire with his left hand while his right hand was grasping the guy wire, still the defendant is not liable unless the presence of the electricity in the span wire was the result of its want of ordinary care.

The negligence found was that there was defective insulation of one or more of the hangers which the defendant ought to have discovered and repaired before the accident.

[2] It is true that greater care is properly demanded of persons who are handling so dangerous an agency as electricity than of those who handle mere ordinary substances, yet the criterion of ordinary care is the same; it is such care as the majority or great mass of mankind exercise under the same or similar circumstances. *Nagle v. Hake*, 123 Wis. 256, 101 N. W. 409.

[3] In the present case there is no evidence tending to show negligence by the defendant, unless it be the evidence tending to show the presence of electricity in the span wire. Even if that condition existed, however, it does not necessarily follow that the defendant was guilty of want of ordinary care. If it appeared without dispute that the span wire had been put up on the previous day by competent workmen, using approved material and appliances, and that it was to all appearances in perfect condition, we suppose none would claim that there would be any sufficient ground for a finding of negligence. There are limits to human endeavor. Even if we exercise the greatest care in our power, accidents will sometimes unaccountably happen. The risk of such accidents all must assume. In the present case it seems, as far as the evidence shows, that there was nothing in the construction or appearance of the wire or the hangers that would even suggest that the insulation had become defective. The hangers were of an approved pattern in common use. They were composed of a copper "ear" with a groove on the top surface into which the trolley wire fitted and was fastened. From this a bolt two or three inches in length, constructed of some very tough, hard, non-conducting substance, extended upward into the iron ear which is attached to the span wire, and over this bolt, screwed on to the top of the ear, is a metal cap which keeps the insulated bolt in place. So long as the nonconducting bolt is intact and the cap is screwed on, even though it be not fully screwed in place, there is no possibility of the trolley wire or the ear in which it rests coming in contact with the span wire, or the metal part of the hanger.

It appears that two of the hangers on the span wire in question

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had been in place two or three years, and one had been in place from five to seven years. There is no evidence that any of them had ever been loose or out of order in any way. They appeared to be all right on the morning in question. The plaintiff himself testifies that when he reached the top of the pole he looked around and saw that things were all right; the insulators and the trolley wire looked all right; he noticed the feed wire running across the street above the trolley wires to the top of the old pole, and the insulator was all right there. He was but a few feet from all these fixtures. It seems to be established beyond peradventure in the case, therefore, that there was absolutely nothing to indicate any defect in the insulation of any charged wire at that place on the morning in question, and that, on the contrary, every appliance had the appearance of being in perfect order. As said before, it does not appear that any of the appliances at this place had ever been out of order, or that the span wire had ever been known to be charged before.

This being the case, there can be but one possible ground of negligence claimed, namely, that the defendant had failed to exercise due care in inspecting the wires and insulators. If there were proof that such hangers became frequently out of repair, and allowed the current to escape to the span wire, it might perhaps be claimed that there was evidence enough to go to the jury on the question whether the defendant was negligent in not making more frequent inspections.

But there is no such evidence. On the contrary, the plaintiff himself says that from his experience as a lineman he did not know that such insulators frequently became leaky or defective, and that he never saw one become defective so that it would leak. He admitted that he had been a trolley lineman for years.

Another lineman of long experience with trolley wires, named Gibbons, called as a witness by the plaintiff, testified that he had known of the cap of a hanger becoming loose by reason of the trolley passing under it day by day; that he had known such things to happen at several places; that he could not say how long such hangers had been on before they became loose (it might be six months or a year, or at the end of ten years); that he could specify no time within which he had known a hanger to become loose; that the loosening of the cap would not necessarily destroy the insulation; that it might last for several years in that condition, giving perfect insulation.

This is practically all of the testimony on the subject of the length of time which ordinarily elapses before the loosening of a hanger takes place from use, and it will be readily seen that there is absolutely no testimony that hangers frequently become loose or defective so as to permit the escape of electricity; in fact, the only reasonable inference to be drawn is that it is generally, if not always, a matter of years. Now the testimony is

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undisputed that the company made a thorough test of the whole line twice a year, in spring and fall, going over and tightening up all the hangers, and that the whole line was gone over in the spring of 1909 to see that the insulation was perfect and nothing loose.

In view of the lack of any evidence tending to show that more frequent inspection was customary with other companies, or was called for by the fact that the hangers easily or frequently became defective from use, and the further undisputed fact that there was absolutely nothing to indicate any defect in any of the hangers in question at the time of the accident, we do not think that the jury was entitled to find any want of ordinary care on the part of the defendant in the present case.

This view of the case obviates the necessity of the examination of any further questions.

Judgment reversed, and action remanded for a new trial.

INGERSOLL *v.* DETROIT & M. RY. CO.

(Supreme Court of Michigan, Feb. 10, 1912.)

[134 N. W. Rep. 441.]

Master and Servant—Injuries to Servant—Safe Place to Work—Railroad.—In maintaining and operating a spur used merely to take timber out of sparsely settled country and over which no regular trains are run, a railroad company is not bound to use the same degree of care to protect its servants that it must use on its main line, and it is unnecessary to protect standing cars by lights or watchmen.

Master and Servant—Injuries to Servant—Assumption of Risk.*—A brakeman who at night acted as a lookout on a car which was being pushed by an engine over a single track logging railway, where he knew loaded cars were left without any system of lights or warning, assumed the risk of injury resulting from a collision with such a car.

Error to Circuit Court, Ogemaw County; Nelson Sharpe, Judge.

Action by Elbert V. Ingersoll, as administrator of the estate of William Quigley, deceased, against the Detroit & Mackinac

*See second foot-note of *Baltimore, etc., R. Co. v. Taylor* (C. C. A.), 41 R. R. R. 717, 64 Am. & Eng. R. Cas., N. S., 717; foot-note of *Kindellan v. Mt. Washington Ry. Co.* (N. H.), 41 R. R. R. 430, 64 Am. & Eng. R. Cas., N. S., 430; first foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563.

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Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Argued before MOORE, C. J., and McALVAY, BROOKE, BLAIR, and STONE, JJ.

Charles R. Henry and *Guy D. Henry* (*James McNamara*, of counsel), for appellant.

Hall, DeFoe & Henry, for appellee.

McALVAY, J. This suit was brought to recover damages for the death of plaintiff's decedent, claimed to have been caused by the negligence of defendant. The facts of the case are as follows: Plaintiff's decedent, William Quigley, was on November 6, 1906, at work as a brakeman for defendant company on a spur branch of its railroad known as Gates Branch, which extended from a station on its main line called South Branch, into the timber towards the north about 10 or 12 miles. The sole purpose of this spur track was to bring out forest products to the main line, and on it no regular trains or trains of any kind were operated according to any schedule or time-table. This spur track was connected with the main line by a switch and all along its line it had been customary at any time, when requested, to take in cars which had been ordered for loading, and place them at any place where the person ordering the car might designate. It was a single track its entire length, except at one place towards the upper end where there was a switch. There were loading grounds wherever the forest's products might be placed throughout its entire length. This placing of cars for loading was usually done by the freight engine and crew which ran a freight train regularly between Rose City and Emery Junction on the main line. On the day when the accident occurred, a gondola car which had been ordered was placed on this track for the man who had ordered it for loading, and it had been loaded with mine props and left on this track. The loading had been finished about 4 o'clock in the afternoon. It appears that it had always been the custom to leave cars along this track without lights or other warning, and this car had no lights or warning upon or near it to indicate its presence. On this day the work train and construction crew had been engaged in extending this spur track further north towards a mill, and had been so employed for two or more days. This work train contained cars for sleeping and eating accommodations for the construction men and train crew, and for the purpose of keeping them supplied with food it was necessary to go to South Branch for supplies. The engine tender and way car were making a trip for this purpose at the time of this accident. The way car was being pushed by the engine which was headed towards South Branch. This could have been changed when this one switch was reached and the engine and

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tender placed ahead, but it was decided before starting that the engine should push the way car the entire distance. Plaintiff's decedent had ridden down with this train with the cars in the same order two days before when loaded cars were found on the track and taken to South Branch. He also knew that while they were extending the branch cars would from time to time be put in on this track as usual. On the night in question he was told by the engineer who was in charge of the train to keep a sharp lookout for cars or anything else on the track. He rode on the platform in front of the way car with a hand lantern, acting as a lookout for cars on the track, and had signaled when they left camp, and gave the signal to back up. His signal could be seen from the engine. The train was going between five and eight miles an hour. Mr. Wroblewski, the foreman of the construction men, was also at the time riding on the platform with deceased. The record shows that on this evening it was not very dark; that one on lookout with a lantern could see several car lengths ahead; also, that some light was given by the headlight of the engine, which was immediately behind the way car, shining through the windows in each end of the car. This train had proceeded two or three miles when without notice or warning of the approaching danger from the lookout to the fireman or engineer the front end of the way car struck the loaded gondola. Plaintiff's decedent was crushed, and died a few days later from the injuries he received.

The trial resulted in a verdict for plaintiff, upon which a judgment was entered. Defendant asks this court for a reversal of this judgment, assigning errors upon certain rulings and instructions of the trial court during the trial.

The contentions of the defendant are: (1) That such a logging branch of a railroad as the one in this case is inherently different from a railroad in general use; that it does not come within the ordinary rules and principles governing main traveled lines of a commercial road; that a railroad company is not held to so great a degree of care to employees working upon such a branch as to those who work upon the main line of the road. (2) That as a matter of law upon the undisputed facts in the case plaintiff cannot recover because of the contributory negligence of plaintiff's decedent. (3) That plaintiff's decedent because of his familiarity with the work, the instructions he had received, and the notice he had of existing conditions assumed this as one of the risks of his employment.

[1] The negligence relied upon by the plaintiff is not because of any unsafe condition of the track, but in leaving upon this track a loaded car without lights or other warning to notify the crew of the work train of its exact location. It is apparent that in case of a woods or logging spur like this Gates Branch, consisting of a single track without switches running its entire length through

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practically a continuous loading ground, without stations or regular stopping places of any kind, without any regular trains or schedules, and without telephone or telegraph system or general rules or orders, and conducted in the manner and for the sole purpose as stated, the general rules applicable to the conduct of general railroads as to the degree of care to be used for the safety of employees cannot be applied. To require the same care obviously would be requiring the performance of the impossible. This court has several times held that railroad companies are not held liable to the same degree of care in maintaining their side tracks, as in the care of maintaining their main lines. *Mich. Cent. R. R. Co. v. Austin*, 40 Mich. 250; *Batterson v. Railway Co.*, 53 Mich. 125, 18 N. W. 584; *Hewitt v. Railroad Co.*, 67 Mich. 71, 34 N. W. 659. In so doing the court has recognized a difference in importance and general uses between the main lines and the side tracks. Such distinction is all the more apparent when the difference between the uses and necessities of the main line of a railroad and a spur branch used only at irregular intervals for bringing out forest products is sharply presented as in this case.

[2] It appears undisputed from this record that the universal custom and practice in operating trains upon spur branches similar to this one is wholly different from that upon main lines, and is identical with the manner in which this spur branch was operated; that it is customary to leave cars standing upon the track as in this case without lanterns or other markers upon them, without torpedoes or fuses on either side of them, all of which are usual and required upon lines with scheduled trains, stations, depots, etc. The reasons for such custom and practice are obvious. The cars are isolated in a region sparsely or entirely uninhabited. It would not be practicable to put men on to maintain flags, lanterns, and other markers or warnings along such a line, and without men so employed lights would go out, and other markers would be subject to removal and destruction. In the instant case it appears that plaintiff's decedent was informed and knew of these conditions from statements made in his presence and from personal experience shortly before the accident. It further appears that on the day in question with this knowledge of the conditions along the track he desired the train to be run in the order in which it did proceed, rather than to have the way car put behind the engine; that, before starting, he was charged by the engineer to look out for cars on the track, and then took his position where he was in full control of the situation. The dangers before him, of which it appears he knew, were incident to his employment. He gave the signals for starting and backing and the train proceeded. In so doing with full knowledge he assumed the risk of all such dangers incident to

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the employment which he knew to exist. *Harrison v. D. Y. A. A. & J. Ry. Co.*, 137 Mich. 78, 100 N. W. 451; *Bradburn v. Wabash R. Co.*, 134 Mich. 575, 96 N. W. 929. The court refused to charge, as requested, that this spur branch was not of such a character as required the same degree of care to employees operating it as to those employed on the main line, and that the notice and warning given to plaintiff's decedent was sufficient, and relieved defendant from liability.

The propositions contained in such request are established in this case. Such spur lines are inherently different from the main lines or those parts of railroads operated the same as main lines, and the reasons and conditions which require the ordinary rules and principles governing the latter relative to care of employees do not apply to the former. A system of warning and notice of dangers to its operatives had been adopted, which appears to have conformed with the general custom and practice upon branches of this character, and commensurate with the requirements of the business. The request was warranted upon the undisputed facts, and the court was in error in refusing to give it.

The question of the contributory negligence of plaintiff's decedent need not be considered.

The judgment is reversed, and no new trial granted.

By a stipulation STONE, J., is substituted for the late HOOKER, J., who sat in the case.

RICHEY *v.* CLEVELAND, C., C. & ST. L. R. CO.

(Supreme Court of Indiana, Nov. 28, 1911.)

[96 N. E. Rep. 694.]

Master and Servant—Injury to Employee—Liability—Nature.*—The employer's liability act (Burns' Ann. St. 1908, § 8017, subd. 2), making corporations liable to employees for injury resulting from negligence of one to whose order the injured person was bound to and did conform, is declaratory of the common law.

Master and Servant—Employer's Liability Act—Effect.—The employer's liability act (Burns' Ann. St. 1908, § 8017), making corporations liable for injury to employees, did not change the fellow-servant rule, except as a fellow servant falls within the statute, and the master ordinarily is not liable for the manner of handling appliances furnished, or for the changing perils of the general employment, or a fellow servant's negligence in the detail of the work, unless the servant brings himself within the exception.

Master and Servant—Railroads—Injury to Sectionman—Negligence of Foreman.†—A section foreman, in suddenly stopping a hand car on which he and his crew were riding, resulting in injury to a sectionman, was acting for the company within the employer's liability act (Burns' Ann. St. 1908, § 8017), making railroad companies liable in certain cases for injury to an employee caused by neg-

*For the authorities in this on the question what are, and are not, the nonassignable duties of a master to his servants, see first paragraph of first foot-note of *Furlong v. New York, etc., R. Co.* (Conn.), 39 R. R. R. 233, 62 Am. & Eng. R. Cas., N. S., 233; fourth head-note of *Hardy v. Chicago, etc., R. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; last paragraph of last foot-note of *Long Pole Lumber Co. v. Gross* (C. C. A.), 37 R. R. R. 669, 60 Am. & Eng. R. Cas., N. S., 669.

For the illustrations in this series showing who are vice-principals or superior servants, see last paragraph of first foot-note of *Furlong v. New York, etc., R. Co.* (Conn.), 39 R. R. R. 233, 62 Am. & Eng. R. Cas., N. S., 233; last paragraph of first foot-note of *Hardy v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; foot-note of *Yazoo, etc., R. Co. v. Stansberry* (Miss.), 38 R. R. R. 761, 61 Am. & Eng. R. Cas., N. S., 761; last foot-note of *Massy v. Milwaukee, etc., Co.* (Wis.), 36 R. R. R. 656, 59 Am. & Eng. R. Cas., N. S., 656.

†For the authorities in this series on the question whether a foreman is a fellow servant of a hand working under him, see foot-note of *Peters v. Michigan Cent. R. Co.* (Mich.), 40 R. R. R. 628, 63 Am. & Eng. R. Cas., N. S., 628; *Tendall v. Great Northern Ry. Co.* (Minn.), 40 R. R. R. 312, 63 Am. & Eng. R. Cas., 312; foot-note of *Peterson v. Chicago, etc., Ry. Co.* (Iowa), 39 R. R. R. 83, 62 Am. & Eng. R. Cas., N. S., 83; third head-note of *Hardy v. Chicago, etc., Ry. Co.* (Iowa), 38 R. R. R. 763, 61 Am. & Eng. R. Cas., N. S., 763; last foot-note of *Hillis v. Spokane, etc., R. Co.* (Wash.), 38 R. R. R. 744, 61 Am. & Eng. R. Cas., N. S., 744.

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ligence of one to whose order he was bound to and did conform, etc.

Master and Servant—Railroads—Injury to Sectionman—"Operation of Trains."†—Injury to a railway sectionman, caused by his foreman suddenly stopping a hand car on which they were riding, did not arise in the operation of railroad trains, within the employer's liability act (Burns' Ann. St. 1908, § 8017), making railroad companies liable for injuries to employees in enumerated cases.

Morris, J., dissenting in part.

Appeal from Circuit Court, Bartholomew County; Marshall Hacker, Judge.

Action by Walter C. Richey against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment sustaining a demurrer to the complaint, and plaintiff appealed to the Appellate Court, whence the cause was transferred with recommendations (93 N. E. 1022). Affirmed.

Hord & Adams, for appellant.

Carter & Morrison, for appellee.

MYERS, J. Appellant instituted an action for damages for personal injuries in two paragraphs of complaint, one of which was withdrawn, and a demurrer was sustained to the other, from which ruling he appeals.

[1-3] The material allegations of the complaint on the subject of the negligence claimed are: That on the 27th day of March, 1905, the plaintiff was an employee in the service of the defendant, doing common labor as a section hand in repairing and maintaining the railroad tracks of the defendant, and doing other varied services, on a section about three miles long, extending from the town of Waldron in a northwesterly direction to Wheeler Creek, which section, with the hand cars, tools, implements, and the employees, were under the control, supervision and subject to the orders of an employee of said defendant known as a "section foreman," and at said time this plaintiff and other section hands laboring for defendant were under the control and subject to the orders of the section foreman, who were engaged

†For the authorities in this series on the subject of the application of statutes making railroads responsible for the negligence of fellow servants, see extensive note, 29 R. R. R. 42, 52 Am. & Eng. R. Cas., N. S., 42; foot-note of *Metz v. Chicago, etc., R. Co. (Neb.)*, 40 R. R. R. 340, 63 Am. & Eng. R. Cas., N. S., 340; *Slaats v. Chicago, etc., Ry. Co. (Iowa)*, 39 R. R. R. 228, 62 Am. & Eng. R. Cas., N. S., 228; first foot-note of *St. Louis, etc., R. Co. v. Ramsey (Ark.)*, 38 R. R. R. 787, 61 Am. & Eng. R. Cas., N. S., 787; foot-note of *Knitter v. Chicago, etc., Ry. Co. (C. C. A.)*, 38 R. R. R. 771, 61 Am. & Eng. R. Cas., N. S., 771; first paragraph of first foot-note of *Schoen v. Chicago, etc., Ry. Co. (Minn.)*, 37 R. R. R. 658, 60 Am. & Eng. R. Cas., N. S., 658.

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in the same common service and in the same department of service of the defendant, under the orders of the section foreman, who at the time was a coemployee and fellow servant with the plaintiff, and the other employees on the section. That the section foreman during all of the time, in performing the service of the corporation, was then and there acting and duly authorized so to do in the place of, and performing the duties of, the corporation in that behalf, as its duly authorized agent. That upon said day, and for a long time previous thereto, the plaintiff was under the absolute control and subject to the orders and direction of the section foreman, in performing his work and labor upon the section. Upon the day aforesaid, and a long time previous thereto, the defendant owned a machine commonly called and known as a "hand car," which was then, and for a long time before said time had been, in the possession and under the exclusive control of the section foreman, which was used by the defendant, under the supervision and control of the section foreman for the defendant, for the purpose of transporting the section foreman and the section hands under his control, and subject to his order, along the line of said section, for the purpose of performing the duties of the corporation, and also for the purpose of carrying and transporting tools, implements, lifting jacks, cross-ties, railroad iron, spikes, dirt, iron rails, gravel, and other material, in repairing and maintaining the roadbed of the corporation, and for performing other duties pertaining thereto. The hand car was a large and heavy machine, with iron wheels, propelled by an appliance attached thereto operated by hand, and propelled by the employees of the company with handle bars. That the machine and car was also equipped with a brake for checking and stopping the car. That upon said day the plaintiff, with other sectionmen who were employees of the defendant, was unloading cross-ties and cars of the defendant at the town of Waldron on said section, when the section foreman gave this plaintiff and the other employees working on said section a specific and special order to desist from that work and load upon said hand car their shovels, picks, lifting jacks, and other tools belonging to the defendant, and specifically ordered that this plaintiff and the employees working upon said section (which order and direction he was authorized to give) get upon the hand car, and proceed with him thereon to the west end of said section at Wheeler Creek, to make repairs upon the roadbed of the defendant by surfacing the same. That while traveling and proceeding under said order and direction of the foreman, who had charge of and management of the brakes, and the management of the car by virtue of the authority vested in him by the defendants to do so, and while traveling upon the hand car subject to the orders of the section foreman to perform the duties required of

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them, the said hand car while running at a high rate of speed, to wit, at the rate of 12 miles per hour, over the defendant's road, and was being propelled as aforesaid by this plaintiff and the other employees under the order and direction of the section foreman who was then present upon the car, ordering and directing its movement, and who was the only person authorized to operate or apply the brakes on the hand car, and who was the only person who had any authority to control or direct the movements and operations of the car, which was then heavily loaded with implements, tools, and the section foreman and other employees on the section, and, while so running the hand car at a downgrade, the section foreman carelessly and negligently and with great force, without any notice to this plaintiff, suddenly applied the brakes to the car, when there was no necessity therefor, at a point more than one mile from their destination, unexpectedly to this plaintiff and the other employees of the car, whereby the car was quickly, suddenly, and violently checked, and reduced from a speed of 12 miles per hour to a speed of 3 miles per hour, almost instantly, by the said section foreman negligently and carelessly jumping upon and throwing his entire weight upon the brakes, he, the section foreman, then and there being a large and heavy man, by reason of which negligent conduct the plaintiff was thrown forward off of the car to the ground upon the railway bed, greatly injuring him, the injuries being set out in detail. At the time aforesaid when he was so injured he was obeying and conforming to the special and direct orders and directions of the section foreman, who then and there had competent authority in that behalf from this defendant to order and direct him, and the section foreman at the time was his superior in authority upon the section, and the section foreman, this plaintiff, and the other employees upon the section at the time were engaged in the same common service in the said department of the defendant as fellow servants performing the duties and labors of the corporation, and at the time of receiving the injury, and during the negligent conduct of the section foreman, and at all of said times, the plaintiff exercised due care and diligence to prevent said injury, and during all of said time he was free from fault or negligence contributing in any degree to his injury.

Upon these allegations appellant claims liability under subdivisions 2 and 4 of the employer's liability act (Burns 1908, § 8017), on the ground that the act enlarges the liability of the operators of railroad where injury results from the negligence of any person in their service to whose order the injured employee is bound to conform and does conform, or who is "at the time acting in the place of and performing the duty of the corporation," and claims to recover by virtue of the order to change work and go upon the car to which he was bound to conform,

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and the negligent act of the section foreman, as the act of the principal, while appellee contends that the act of giving an order to change the work and go upon the car was general and no broader than the scope of the employment, the giving of which was not negligent, and that the injury did not arise proximately from that order, or in attempting to obey it, but from the act of the foreman in suddenly stopping the hand car, in doing which he was but a fellow servant within the common-law rule, and the statute, and reliance is placed by appellee upon the cases of *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303, and *Thacker v. Chicago, etc., Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792, upon the theory that the foreman and appellant, in the matter of being transported with the tools to and from their work, were mere fellow servants. It was held, in the *Justice Case*, that at common law a section foreman in employing and discharging men is a vice principal, but that in directing them, after their employment, he is a fellow servant. The case was determined prior to the enactment of the employer's liability act, which enlarges the liability of railroads to those who are coemployees and fellow servants, under some conditions. It was held in *Indianapolis, etc., Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, that the second or concluding clause of the fourth subdivision of the act only qualifies or limits the liability expressed in such concluding clause. The second clause of subdivision 4 is a declaration of the common-law liability. *Thacker v. Chicago, etc., Co.*, supra. The second subdivision of section 8017 raises a liability when injury arises from the negligence of one to whose order or direction the injured party was bound to conform and did conform.

Do these subdivisions undertake to create a liability from obedience to an order only, or also from the negligent act of one whose position is such that others are bound to obey, or conform to his orders, from the fact of his position, irrespective of the thing about which he is acting, or the manner in which or the circumstances under which it is done, from which injury arises? That is, does liability arise from the fact of direct conformity to an order only, or does the negligent act of the one occupying a position which commands obedience create liability where the act is done during the time of conforming to the order?

It has been held, as to an order, that it must be special, as contradistinguished from a general order, as broad as the scope of the service and the employment; but those cases will be found to present somewhat exceptional facts. *Indianapolis, etc., Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; *McElwaine-Richards Co. v. Wall*, 166 Ind. 267, 76 N. E. 408; *Southern, etc., Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Indiana, etc., Co. v. Buskirk*, 32 Ind. App. 414, 68 N. E. 925; *Grand Rapids, etc., Co. v. Pettit*, 27 Ind. App. 120, 60 N. E. 1000.

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It has also been held that a special order may arise within the scope of the general employment, and by way of distinction, that a general order is one under which the servant works in his discretion, without compulsion of an order. The order here to go upon the hand car was no broader than the general scope of the employment, under the allegations of the complaint, though the injury arose in conforming to it. *McElwaine-Richards Co. v. Wall*, *supra*; *Southern, etc., Co. v. Harrell*, *supra*; *Indianapolis, etc., Co. v. Kane*, *supra*.

It has been intimated, if not decided, that an order need not be negligent in itself, in order to authorize a recovery, if injury arises whilst complying with it, by an act of one authorized to give it. *Muncie Pulp Co. v. Davis*, 162 Ind. 558, 561, 70 N. E. 875; *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87, 54 N. E. 414.

The complaint is not grounded alone upon the order being special, and negligent, but upon the fact of obedience to the direction of the foreman; as to going upon the hand car, and the direct negligence of the latter in precipitating his weight upon the car brake, and suddenly stopping the car without notice or warning to appellant. If there arises a cause of action from obedience to an order to do a thing by one authorized to give it, from the doing of which an injury arises, does it follow that the negligent doing of the thing by the person authorized to give the order to do it gives rise to a cause of action, from that fact, or does the statute mean still to maintain the relation of fellow servants, when the superior is at the time engaged in the same or common service, and impose liability only when the superior servant is discharging the duty of the master, and not that of a fellow servant?

It is alleged that the foreman had exclusive control over the hand car, and the only person who had authority to control its movements and operation, and the case is not like that of *Thacker v. Chicago, etc., Co.*, *supra*, as to the first, second, and third paragraphs of complaint, which were held bad because the order given by the foreman to stop the car was not negligent in itself, but executed by another in a negligent manner, while the fourth paragraph of complaint was held good because it charged the giving of the order by the foreman to stop the car suddenly, and here the allegation is that the foreman himself did the negligent act. The case falls squarely within the rule declared in the *Thacker Case* as to the fourth paragraph of complaint, provided the section foreman was acting for the master in the movement of the car in the discharge of the master's duty, or a duty imposed upon the superior. The force to be imputed to the statute does not arise merely from the relation of fellow servants, for the act recognizes them as such, but attaches the act of one who for the time being is acting for the master by virtue of his authority over his fellow

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servants in discharging the duties of the master. The condition of superior rank is not alone sufficient. It must be such that the servant is at the time acting in the place of or discharging the duty of the master, or one to whose order others must conform. *Folland v. C., C. & St. L. Ry. Co.*, 91 N. E. 594.

So that the question is narrowed to the proposition whether the section foreman in suddenly stopping the hand car was one to whose order appellee was bound to conform or was at the time acting for, or discharging the duty of the master. The statute has not changed the fellow-servant rule except as the fellow servant falls within some of the classifications out of which liability arises, and the master ordinarily is not liable for the manner of handling appliances furnished, nor for the changing perils of the general employment, or a fellow servant's negligence in the detail of the work, unless the servant brings himself within the exception. *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418.

It declares the common law, and does not increase the class of those who are at common law vice principals under some conditions, while in others it does increase the class whose acts give rise to liability. *Ft. Wayne, etc., Co. v. Parsell*, 168 Ind. 223, 79 N. E. 439; *Dill v. Marmon*, 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; *Thacker v. Chicago, etc., Co.*, supra; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026.

In the last case this court quotes with approval *Shearman & Redfield on Negligence* (5th Ed.) § 283, where it is said: "The test to be applied in each case, under this principle, is to inquire what would have been the master's duty had he been personally present. To whom did he delegate that duty, he being absent? That delegate, whether he be high or low, should be deemed with respect to that duty a vice principal. Foremost among the powers of a master, as already pointed out, is that of giving orders. Foremost among his duties is that of general superintendence. He is equally responsible where he deposes to another the duty of giving orders which he ought to give himself if present; and, if he deposes his power and duty of superintendence, he is responsible for the failure of his deputy to properly superintend. * * * The master's responsibility for the acts of his vice principal is to be determined, not merely by the character of the act which the latter performs, but also by the character of that which he fails to perform. If a vice principal, invested with the power and duty of superintendence, negligently permits any act to be done which it would be the duty of the master, if present, to prevent, the master is responsible to the servant injured thereby, simply because of the failure of his superintending vice principal to prevent it being done. And the master is none the less liable if the negligent act is done by the vice principal himself." And this is the direct rule of *Indianapolis, etc., Co. v. Shumack*, supra, and in *Thacker*

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v. Chicago, etc., Co., supra, though in neither of those cases was the question raised or decided as to the applicability of the employer's liability act, both parties in each case treating the question as if it did apply, while here the question of its application is directly presented.

In going upon the hand car, and in being carried upon it, appellant was acting in obedience to an order of one who had authority to direct him. It was not necessary that the injury should arise directly from obedience to that order, but it is sufficient if it arises during compliance with it. In *Louisville, etc., Co. v. Wagner*, 153 Ind. 420, 53 N. E. 927, it was held that it was not necessary that the "order, or direction in said subsection (2) be negligent; but it is sufficient if the employee was bound to conform, and was conforming at the time of the injury, to the order or direction of the person whose negligence caused the injury." In that case it was said: "The order to loose the truck was the proximate cause of the injury. And it was both directing the plaintiff into a dangerous situation that he was bound to enter, and then ordering the truck turned loose upon him without warning, that constitute the actionable negligence." In *Thacker v. Chicago, etc., Co.*, supra, the sectionmen were obeying a general order, when the foreman gave the negligent special order, which another obeyed, from which Thacker was injured. Here appellant was acting under an order to go upon the car, and while being carried upon it, in conformity to the order, and in its continuity of execution, he was injured by the direct negligence of the foreman. There was an intimate connection between appellant's conforming to the order in being upon the car, and the action of the foreman which caused the injury. In other words, the order to go upon the car was a proper and continuing one, and not negligent. The injury arose subsequently in conforming to that order, and under the English cases, in construing the British act upon which our own is modeled, a liability arises. *Wild v. Waygood*, 1 Q. B. 783, and *Millward v. Midland Ry.*, 14 Q. B. D. 68, were followed in the *Wagner* and *Thacker* Cases. *Dresser, Employer's Liability*, p. 304.

The court is of the opinion that this complaint, if otherwise sufficient, is good under the rule announced as to the fourth paragraph of complaint in the *Thacker* Case, and the rule in the *Shumack* Case, and the doctrine of *Island Coal Co. v. Swaggerty*, supra, and *Louisville, etc., Co. v. Wagner*, supra, upon the theory that the act of the section foreman in doing a negligent thing himself, from which the injury arose, was as potent as his giving an order to do it; that it necessarily involved the same mental process to determine to do what he did, as if he had given an order to another to do it as he did it; that the master's duty to exercise reasonable care to make and keep the appliance reasonably safe was a duty imposed upon the section foreman; and that this duty was

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extended to the operation of the hand car, so far as he himself was concerned in operating it, as applied to the question of keeping it safe, for it would be the refinement of reasoning to say that he by giving the order to another would create a liability, but if he did the thing himself it would not. *Thacker v. C., I. & L. Ry.*, supra; *Toledo, etc., Co. v. Pavey*, 39 Ind. App. 284, 79 N. E. 529; *Frandsen v. C., R. I. & P. R. Co.*, 36 Iowa, 372.

[4] A more serious question arises over the proposition as to whether under the employer's liability act it can be said as a matter of law that appellant's injury arose from the operation of a railroad train. If the case, under the facts pleaded, can be said to fall within the statute, it must be because the running of the hand car was the "operation" of a railroad, within the restricted meaning of the operation of trains, which the court has been constrained to give the act, in order to uphold it in any respect, and that is the real question here. The statutes of other states and the construction given them do not materially aid us, owing to the difference in the statutes and the difference in constitutional provisions. In Iowa, the language of the act is "connected with the use and operation of a railroad, on or about which he was employed." Code, § 2071. See *Cahill v. Ill. Cent. Co.*, 148 Iowa, 241, 125 N. W. 331, 28 L. R. A. (N. S.) 1121; also, *Johnson v. Great Northern, etc., Co.*, 104 Minn. 444, 116 N. W. 936, and the valuable notes in 18 L. R. A. (N. S.) 477; also, *Hanson v. Northern Pac., etc., Co.*, 108 Minn. 94, 121 N. W. 607, 22 L. R. A. (N. S.) 969, and the note. In Kansas the language is "any employee of said company in consequence of any negligence of its agents, or by any mis-management of its engineers or other employees." Gen. St. 1909, § 6999. In Minnesota, "by reason of the negligence of any other servant thereof." Rev. Laws 1905, § 2042.

The Texas statute restricts liability to those "employed in the work of operating cars, locomotives or trains." Sayles' Ann. Civ. St. 1897, art. 4560f. South Carolina extends the liability to employees the same as to those who are not employees and to injuries resulting "from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant, employed in another department of labor from that of the party injured, or of a fellow servant, on another train of cars, or one injured in a different piece of work." Const. 1895, art. 9, § 15. By the statute of Arkansas vice principals are defined as well as those who are fellow servants. The Mississippi Constitution is similar to the South Carolina act, and the Code follows it. Const. Miss. art. 7, § 193. The language of the Missouri statute is, "while engaged in the work of operating such railroad by reason of the negligence of any other agent or

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servant thereof," and defines vice principals and fellow servants. Rev. St. Mo. 1889, § 2873. The Montana act provides that the liability for injury to a servant "acting under the orders of his superior is the same as if such servant or employee were a passenger." Code Montana § 905 (Rev. Codes, § 4286). The Ohio Code declares who are superiors and who fellow servants, and provides for liability in addition to the liability then existing, when arising from the negligence of the superior. 87 Ohio Laws, p. 149; Bates' Annot. Stat. 1787-1904, § 3365.

It may be conceded that the hazard of the service upon which liability is predicated is extended in most jurisdictions further than we can extend it under our Constitution. In order to give effect, as far as could possibly be done, to the employer's liability act, so as to escape the Constitutional objection of special or class legislation, the court has been compelled to draw the line of separation at the character of the employment, and not the character of the employer, and, as applied to railroads, at the employment which is hazardous in its discharge, as affected by the operation of trains, for, as pointed out in *Foland v. C., C. & St. L. Co.*, supra, if a railroad employee in the construction of a bridge is injured, and the railway is liable, and an employee of a private person doing the same work is injured, and there is no liability, the statute would clearly fall within the constitutional prohibition. *Foland v. C., C. & St. L. Co.*, 92 N. E. 165; *Indianapolis, etc., Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711; *Bedford Quarries Co. v. Bough* (1907) 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; *Town v. Crawfordsville* (1905) 164 Ind. 117, 73 N. E. 78, 68 L. R. A. 622; *Sellers v. Hays* (1904) 163 Ind. 422, 72 N. E. 119; *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273, 106 Am. St. Rep. 268; *City v. Hays* (1904) 162 Ind. 193, 70 N. E. 134; *Street v. Varney, etc., Co.* (1903) 160 Ind. 338, 66 N. E. 895, 61 L. R. A. 154, 98 Am. St. Rep. 325; *Dixon v. Poe* (1902) 159 Ind. 492, 65 N. E. 518, 60 L. R. A. 308, 95 Am. St. Rep. 309; *Connelly v. Union, etc., Co.* (1902) 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Cotting v. Kansas City Co.* (1901) 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *Johnson v. St. Paul Co.* (1890) 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Lavallee v. St. Paul Co.* (1889) 40 Minn. 249, 41 N. W. 974; *Johnson v. Goodyear Co.* (1899) 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17; *Slocum v. Bear Valley Co.* (1898) 122 Cal. 555, 55 Pac. 403, 68 Am. St. Rep. 68; *Ballard v. Mississippi Co.* (1902) 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476. If we should hold the liability as depending upon the employer and not upon the character of the employment, we would then be forced to hold that a mechanic in a railway shop repairing a locomotive or car wholly disconnected from any danger, different from that of a mechanic employed by a private person, corporation, or person, other than those oper-

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ating railroads, would have a cause of action against a railway company, while an employee of a private person, or corporation doing the same work, and suffering the same injury, from a like cause, would not have a cause of action. In its attempt to uphold the law as far as it could be done, by basing it upon the character of the employment, and not of the employer, so as to avoid the constitutional objection, this court, in *Pittsburgh, etc., Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301, followed the rule in Iowa, Minnesota, and Kansas, of classification by the character of service, and upheld the act as to railroads, by putting them in a class by themselves, on account of the hazards in operating trains. This was followed in *Indianapolis, etc., Co. v. Houlihan*, *supra*. This classification of railroads by themselves was approved by the Supreme Court of the United States in *Tullis v. Lake Erie Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, following the rule declared in the Supreme Courts of Iowa and Kansas, as a classification by employment, and not by employer., *Deppe v. Chicago, etc., Co.*, 36 Iowa, 52; *McAunich v. Miss., etc., Co.*, 20 Iowa, 338; *Missouri, etc., Co. v. Haley*, 25 Kan. 35, 53.

In the decision of *Chicago, etc., Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675, the Supreme Court of the United States, in construing a statute similar to that of Iowa, puts the decision upon the same ground as the *McAunich Case*.

A classification of railroads has been upheld on the same grounds in Minnesota. *Lavallee v. St. Paul, etc., Co.*, 40 Minn. 249, 41 N. W. 974, and *Johnson v. St. Paul, etc., Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419.

A Mississippi statute was held invalid because of imposition of liabilities upon all corporations irrespective of the nature of their business, which were not imposed on natural persons. *Ballard v. Miss., etc., Co.*, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476.

In *Bedford, etc., Co. v. Bough*, *supra*, the court was again forced, in order to sustain any part of the law, to apply the rule of distinction as being the character of the employment, and to hold that the act was invalid except as to corporations or persons operating railroads, because it imposed obligations upon them that were not imposed on private persons or copartnerships in the same business, and under the same circumstances and conditions.

Coming to the case of *Indianapolis, etc., Co. v. Kane*, *supra*, as was pointed out in the *Foland Case* on petition for rehearing (92 N. E. 165), the question was not raised as to whether a bridge carpenter came within the provisions of the act, both parties treating it as if he did, and the court adopted the theory of the parties in that case; but the question was squarely presented in *Indianapolis, etc., Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711. Besides the judgment in the *Kane Case*

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was affirmed, and the rule is that, while the court will search the record to affirm a case, it will not do so for the purpose of reversing it. The rule is too broadly stated in the Kinney Case and in the Foland Case, following it, if it is understood as limiting liability to those engaged in train service; but we do not so understand those cases, or so intend to hold, or limit it, but that it applies to the hazards of the operation of railroad engines and trains. Bearing in mind that the ground for the classification is the character of the employment from which the hazard arises, it may be that in a specific case a workman upon the track is subject to the hazards peculiar to the running of trains themselves, from collision, derailment, falling or projecting materials, or from other causes where employment on or about the track or on or about bridges is affected by their operation, or in movements on the track, and affected by their operation in the necessary work upon it. At least it cannot be said as a matter of law that there is no hazard from the operation of trains, in working upon the track, or where operation of trains produces hazard, nor even that it is a less hazard than direct operation of trains.

To escape the constitutional objection as herein pointed out, we think the general doctrine of Indianapolis, etc., Co. v. Kinney, supra, and Foland v. C., C., C. & St. L. Co., supra, must be adhered to, and that each specific case must be governed by the question whether the service in which the employee is at the time engaged is such as subjects him to danger and injury from the operation of trains, whether actually engaged as an operative on a train, or not. Mobile, etc., Co. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 322 L. R. A. (N. S.) 226.

This brings us to the consideration of the case of L. & N. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921. In Tullis v. Lake Erie Co., supra, the Supreme Court of the United States upheld the constitutionality of the employers liability act of this state, upon the ground that the construction put upon it by this court, as applying to the hazards of the operation of railways, was a reasonable classification, and that it did not offend against the equal protection clause of the federal Constitution and the construction of our own Constitution, and the acts arising under it not presenting a federal question are not the subject of review by that court, according to its construction. In the Melton Case the court uses language which, whilst properly involved in the federal question, as to the equal protection and due process of law clauses of the fourteenth amendment, was not in our judgment sufficiently guarded in view of the rule in the Tullis Case, and of the construction by this court of the act in its relation to our own Constitution. An examination of the case discloses that the sole question before the court was as to the constitutionality of the act as applied to the fourteenth amendment to the federal Constitution, and that this is so appears not

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only from the opinion itself, but from views, expressed in the late case of *Mobile, etc., Co. v. Turnipseed*, supra. Incidentally, it will be noticed that while the question of the full faith and credit clause of the federal Constitution was sought to be invoked in that case as binding upon the courts of Kentucky, by the construction placed upon our statute, the court expressly declines to consider the question, because it was in no wise presented to the Kentucky Court of Appeals, and it of course follows that it was not determined in that case, and the only question conferring jurisdiction upon the Supreme Court was the question involving the fourteenth amendment, which, as we understand it, was the only question before the court, in the discussion of which the court refers to the construction put upon the statute by this court as too restricted. Upon the theory that no federal question was involved upon the construction of the statute by this court, that court, in *Pittsburg, etc., R. Co. v. Lightheiser*, 212 U. S. 560, 29 Sup. Ct. 688, 53 L. Ed. 652, dismissed for want of jurisdiction the cases of *Pittsburgh, etc., Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033, and *Pittsburgh, etc., Co. v. Collins*, 168 Ind. 467, 80 N. E. 415, and *Pittsburgh, etc., Co. v. Ross*, 169 Ind. 3, 80 N. E. 845, in each of which the question under our Constitution was directly involved.

If, as seems to be the case, the Supreme Court in the *Melton Case* regards the construction by this court as too restricted, with respect to the character of employees, as restricted to those in the train service, we agree with it; but we do not so understand the rule, but understand and hold that it should be drawn at those who incur the hazard of and injury by and from the operation of trains, but we cannot go further without offending the prohibition of our own Constitution against special and class legislation. To adopt the broad construction apparently given in *L. & N. Co. v. Melton*, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618, and followed on appeal to the Supreme Court of the United States, could but lead to the entire overthrow of the act; but it seems to us that there is a line of possible harmony in the cases, on principle, though it could not harmonize our views with the rule adopted by the Supreme Court of Appeals of Kentucky in the *Melton Case*, as applying to a bridge carpenter, whose injury was in no wise caused by or connected with the hazard of operating trains, or different from that in any other business of a like character. The distinction, it seems to us, lies not from the general inclusion of employees in a class, owing to the impracticability, if not the impossibility of enacting a statute which would in and of itself apply to every condition or character of modern employments it may be sought to apply it to, but in the application of the statute in a particular case, irrespective of the general classification, to those whose employment

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for the time being exposes them to the hazards of, and injury from, the operation of trains.

We are asked by the Appellate Court to overrule *Pittsburg, etc., Co. v. Rogers*, 168 Ind. 483, 81 N. E. 212, upon the ground that, when a constitutional question is presented in that court, it has but one duty to perform, and that is to transfer it to this court, and, as this court must pass upon the point whether a constitutional question is involved, it ought to assume jurisdiction of the case for all purposes. There would seem to be some ground for this claim, stated in the abstract; but the difficulty lies in the fact that notwithstanding a constitutional question presented upon the record has been definitely and specifically settled, and is no longer an open one, it would be possible to divest the jurisdiction of that court, by the simple device of putting a constitutional question in the record, which can be done in a very great number of cases, however devoid of merit, and evade the very object of the creation of the court, by curtailing its jurisdiction, in that way, so that it seems to us the better and safer rule is the one announced in *Pittsburg, etc., Co. v. Rogers*, *supra*, and cases following it. That is the well-established rule in the^a Supreme Court of the United States, as shown by those cases, by which, under the guise of procuring decisions upon federal questions, it is sought to procure decisions upon merely state questions, whether by appeal, writ of error, or certiorari. *Watkins v. Amer. Nat. Bk.*, 109 U. S. 599, 26 Sup. Ct. 746, 50 L. Ed. 327; *Bonin v. Gulf, etc., Co.*, 198 U. S. 115, 25 Sup. Ct. 608, 49 L. Ed. 970; *Empire Co. v. Hanley*, 198 U. S. 292, 25 Sup. Ct. 691, 49 L. Ed. 1056; *Warder v. Loomis*, 197 U. S. 619, 25 Sup. Ct. 799, 49 L. Ed. 909; *Spencer v. Duplan Co.*, 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287; *Arbuckle v. Blackburn*, 191 U. S. 405, 24 Sup. Ct. 148, 48 L. Ed. 239; *Northern Pac. Co. v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506.

The difficulty confronting us in this case, in view of the holding in *Thacker v. C., I. L. Ry.*, *supra*, *Chicago, etc., Co. v. Sackett*, *supra*, and *Toledo, etc., Co. v. Pavey*, *supra*, is that in neither of those cases, as in the case of *Indianapolis, etc., Co. v. Kane*, *supra*, was the question raised as to the applicability of those cases to the question of liability under the employer's liability act.

We are, however, in view of later cases in which the question was directly raised, constrained to hold that appellant does not state a cause of action under the employer's liability act, the theory upon which his action is grounded, and that the judgment must be affirmed, and it is so ordered.

MORRIS, J., dissents from so much of the opinion as holds that appellant's injury was not one arising from the hazards of operation of railroad trains.

JOHNSON *v.* CAROLINA, C. & O. R. Co. et al.

(Supreme Court of North Carolina, Dec. 13, 1911.)

[72 S. E. Rep. 1057.]

Master and Servant—"Independent Contractor"—Definition.*—An "independent contractor" is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods, without being subject to his employer's control, except as to the results of the work.

Master and Servant—Independent Contractor—Relation.*—The relationship of independent contractor is not changed because the owner reserves the right to supervise the work through an engineer, architect, etc., for the purpose of seeing that it is done pursuant to the contract.

Master and Servant—Independent Contractor—Existence of Relation.*—If a workman's immediate employer was not acting in good faith under an alleged contract with defendant railroad company for doing work, but was in fact only the company's agent, such employer was not an independent contractor so that plaintiff could sue the railroad company for injuries received.

Appeal from Superior Court, Burke County; Lane, Judge.

Action by Henry Johnson against the Carolina, Clinchfield & Ohio Railroad Company and others. From a judgment for plaintiff, defendant railroad company appeals. Affirmed.

There was evidence tending to show that, on or about July 15, 1908, plaintiff was injured, while at work as an employee of defendant company, by reason of a defective car, being then used for hauling dirt in the construction of defendant road, and that the injury was attributable to the negligence of defendant. There was evidence tending to show that there was no negligence; that plaintiff was, at the time, an employee of Propts & Co., an independent contractor; and, further, that plaintiff had executed a receipt in full discharge for the liability. The following verdict was rendered:

"(1) Was plaintiff injured by the negligence of the defendant?
Answer: Yes."

*For the authorities in this series on the question who are, and are not independent contractors, see extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317; *Campbell v. Jones* (Wash.), 38 R. R. R. 473, 61 Am. & Eng. R. Cas., N. S., 473; *Louisville, etc., R. Co. v. Hughes* (Ga.), 36 R. R. R. 1, 59 Am. & Eng. R. Cas., N. S., 1; *Beckman v. Meadville, etc., Ry. Co.* (Pa.), 28 R. R. R. 224, 51 Am. & Eng. R. Cas., N. S., 224; *Boucher v. New York, etc., R. Co.* (Mass.), 27 R. R. R. 1, 50 Am. & Eng. R. Cas., N. S., 1.

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"(2) Did the plaintiff by his own negligence contribute to his own injury? Answer: No.

"(3) Did the plaintiff release any cause of action he had against defendant on account of such injury? Answer: No.

"(4) What injury, if any, is plaintiff entitled to recover? Answer: Two hundred dollars."

Judgment on verdict for plaintiff, and defendant excepted and appealed.

Hudgins & Watson and *A. Hall Johnston*, for appellant.
Spainhour & Mull and *S. J. Ervin*, for appellee.

HOKE, J. [1] It was chiefly objected to the validity of this recovery that plaintiff was, at the time, the employee of an independent contractor (Propts & Co.), and that, on the facts in evidence, there had been no breach of duty towards plaintiff on the part of the railroad company. This doctrine of independent contractor and its effect on the rights of parties have been the subject-matter of discussion in several recent decisions of the court, as in *Hopper v. Ordway*, 72 S. E. 839, at the present term; *Denny v. Burlington*, 155 N. C. 33, 70 S. E. 1085; *Beal v. Fiber Co.*, 154 N. C. 147, 69 S. E. 834; *Thomas v. Lumber Co.*, 153 N. C. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584; *Hunter v. Lumber Co.*, 152 N. C. 682, 68 S. E. 237, 29 L. R. A. (N. S.) 851, 136 Am. St. Rep. 854; *Young v. Lumber Co.*, 147 N. C. 26, 60 S. E. 654; *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492; *Craft v. Timber Co.*, 132 N. C. 151, 43 S. E. 597. In *Beal v. Fiber Co.*, the following, as general definitions, are referred to with approval: "An independent contractor has also been defined to be one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work." *Lurton, J.*, in *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925, and from *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an independent contractor, and in such case the contractor alone, and not the employer, is liable for damages caused by the contractor's negligence in the execution of the work."

[2] *Hopper v. Ordway*, at the present term and *Denny v. Burlington* support the proposition that, when a contractor has undertaken to do a piece of work according to plans and specifications furnished, and within the meaning of the definitions referred to, this relationship of independent contractor is not affected or changed, because the right is reserved for the engineer,

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architect, or other agent of the owner or proprietor to supervise the work to the extent of seeing that the same is done pursuant to the terms of the contract. The position is carefully stated in Denny's Case, as follows: "When the relation of independent contractor has been established, and the work is to be done according to plans and specifications furnished, the mere fact that a supervisor of the contractee is present for the purpose of seeing that the work is being done according to the contract, at the time the tort complained of is committed, does not render the contractee liable therefor." And Hopper's Case, *supra*, is in full approval of this statement. Again, in Beal's Case, citation is made from Thompson on Negligence, as follows: "If the proprietor retains for himself or for his agent [e. g., architect and superintendent] a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is deemed the mere agent or servant of the proprietor, and the rule of respondeat superior operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts, or not. It is not necessary, in such a case, that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control."

[3] On the facts of this case, and on the various contracts presented for consideration, the rights of supervision and control reserved to the engineer of the railroad company are so extensive and all-pervading that we incline to the opinion that these operators may not maintain the position of independent contractors, but are themselves only representatives and agents of the company, for whose acts the company is, in the main, responsible. It is not necessary to decide the question, however, as the jury, under a correct charge, have found as a fact that the plaintiff's immediate employer, at the time of the injury and in reference thereto, was not acting bona fide under the terms of the contracts, but was, in fact, only the agent of the company in the work that plaintiff was engaged in doing. The position was recognized in *Young v. Lumber Co.*, *supra*, and, in our opinion, there was evidence in the present case permitting its consideration. There is no error, and the judgment below is affirmed.

No error.

ST. LOUIS & S. F. R. CO. v. YOUNG.

(Supreme Court of Oklahoma, Jan. 9, 1912.)

[120 Pac. Rep. 999.]

Evidence—Opinion Evidence—Value of Live Stock.—One witness testified that he was a farmer; had handled cattle for 18 years; had experience in buying and selling and estimating value of cattle; and knew the value of cattle such as those in question; and testified that the cattle in question were worth from \$50 to \$75 per head. Another testified that he was a stockman, and had handled cattle for 13 years, and had experience in buying and selling, and that he examined the cattle in question after they were injured, and that had it not been for the injuries they would have been worth from \$40 to \$65 per head. Held that, while perhaps not the best class of evidence obtainable on the subject, yet it was competent, and no error was committed in allowing said witnesses to testify; the weight and sufficiency of such evidence together with the credibility of the witnesses being matters to be determined by the jury under proper instructions by the court.

Appeal and Error — Review — Sufficiency of Evidence. — Where there is some evidence tending reasonably to support the allegations of the petition, the issue should be submitted to the jury under proper instructions, and in such case the verdict will not be disturbed on appeal.

Carriers—Live Stock Shipment—Notice of Injury.*—A provision in a contract of shipment requiring as a condition precedent to a recovery of damages to live stock, that the shipper will give notice in writing of the claim therefor, to some general officer or station agent, at the nearest station, before such stock is removed, or before such stock is allowed to be mingled with other stock, such notice to be served within one day after delivery of stock at destination, is a reasonable and valid provision, and will be upheld by the courts, but a substantial compliance with the terms of such provision will be sufficient.

(Syllabus by the Court.)

Commissioners' Opinion, Division No. 1. Error from Kiowa County Court; J. W. Mansell, Judge.

*See foot-note of *Midland Valley R. Co. v. Ezell* (Okla.), 41 R. R. R. 557, 64 Am. & Eng. R. Cas., N. S., 557; last foot-note of *Hayes v. Missouri, etc., Ry. Co.* (Kan.), 40 R. R. R. 226, 63 Am. & Eng. R. Cas., N. S., 226; fifth foot-note of *Estes v. Denver & R. G. R. Co.* (Colo.), 40 R. R. R. 216, 63 Am. & Eng. R. Cas., N. S., 216; first foot-note of *Old Dominion S. S. Co. v. C. F. Flanary & Co.* (Va.), 39 R. R. R. 345, 62 Am. & Eng. R. Cas., N. S., 345; last foot-note of *Pierson v. Northern Pac. Ry. Co.* (Wash.), 39 R. R. R. 303, 62 Am. & Eng. R. Cas., N. S., 303.

St. Louis & S. F. R. Co. v. Young

Action by T. H. Young against the St. Louis & San Francisco Railroad Company, to recover damages on account of negligence in shipping cattle. Judgment for the plaintiff. Defendant brings error. Affirmed.

This action was begun in the county court of Kiowa county on the 25th day of February, 1909, by T. H. Young, hereinafter designated as plaintiff, against the St. Louis & San Francisco Railroad Company, a corporation, to recover \$635, as damages for alleged injuries to certain live stock, shipped over its road. It appears that on the 21st day of May, 1907, plaintiff shipped over defendant's railroad from Vernon, Tex., to Snyder, Okl., a distance of 40 or 50 miles, 35 head of cattle. The contract of shipment was in writing, and is attached to plaintiff's petition as an exhibit and made a part thereof. Therein the agreed value of said cattle was fixed at \$30 per head, and the reasonable value of the entire shipment at \$1,050. It also appears that defendant agreed to safely transport said cattle to the agreed destination in consideration of a stated price, which had therefore been paid the railroad company by the plaintiff; that defendant did not comply with its contract, but was careless and negligent in the handling of said cattle, and as a result thereof eight head of said shipment died, four dying the day following their arrival at Snyder, and four others within a short period of time thereafter; that by reason of the death of the eight head of cattle plaintiff was damaged \$240; that one cow was damaged \$25; that all the others were more or less injured, and that plaintiff's time in caring for and looking after said cattle, occasioned by the negligence of the railroad company, was of the reasonable value of \$100—making a total of \$635, for which plaintiff prayed judgment. Defendant answered by general denial, and also alleged that by virtue of the contract of shipment set up in plaintiff's petition as Exhibit A; plaintiff agreed to give a written notice to the company within one day after the delivery of the cattle at the point of destination, and before the cattle were removed from the place of destination, showing the extent and character of any damages which they may have received, and that no such notice had been given, and the company by reason of such failure was not liable for any damages; and as a further defense the railroad company alleged that by reason of a mistake of one of its agents there had been an undercharge on the freight of said car in the sum of \$23, for which it prayed judgment against plaintiff. Plaintiff replied by general denial, and further alleged full compliance with the terms of the contract set up in his petition. Trial was had to a jury, and a verdict was returned in favor of the plaintiff in the sum of \$487. Motion for new trial was made, overruled, and judgment entered on the verdict; time

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was given to make and serve a case for this court; and the railroad company prosecutes this appeal to reverse said judgment.

W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, for plaintiff in error.

O. B. Riegel, for defendant in error.

ROBERTSON, C. (after stating the facts as above). Plaintiff in error, hereinafter called the railroad company, relies upon five assignments of error for reversal, the first being: "The court erred in admitting incompetent, irrelevant, and immaterial testimony in said cause, over the objections of the defendant." The record shows, without question, that the cattle were delivered to the railroad company, at Vernon, Tex., in good condition. That they left there about 9 o'clock a. m., and arrived at Snyder about noon of the same day; that while the car was standing stationary on the main track at Frederick, the engine being engaged in switching, a freight car escaped from the train crew and ran wild down the track and struck the train, which contained the car occupied by the cattle, with terrific force, knocking the cattle down and injuring them in various ways, such as, "horns knocked off, shoulders out of place, breasts bruised, ribs broken, hind parts crippled, legs dragging, briskets mashed, abrasions of the skin," etc. (Record, pp. 27, 28, 29.) The evidence further discloses that by reason of such injuries all the cattle (35 head) were more or less injured, while 8 head died, and 1 cow lost a calf. The fact of the injury, as well as the reasons thereof, are undisputed.

[1] It became necessary for plaintiff to prove the value of the cattle, both before and after the accident, and for that purpose T. H. Young, the plaintiff, testified that he was a farmer, and had worked with cattle on a range for 18 years, and had experience in buying and selling cattle and estimating their value, and knew the value of the cattle in question; that they were worth from \$50 to \$75 per head before they were injured; that eight head died as a result of the injuries so received, making as to them, a total loss; that all were badly bruised, and several permanently crippled. He testified with great particularity as to the nature and character of the injuries. Mr. Ferrell, a witness for the plaintiff testified that he was a stockman, and had handled cattle for 13 years, and was experienced in the buying, selling, and handling of the same; and he examined the cattle in question after the injuries, and that had it not been for such injuries the cattle would be worth from \$40 to \$65 per head, but, as delivered, 12 head were worth not to exceed \$5 each, and the others not to exceed \$15 per head. Another witness, J. W. Chitwood, testified that he lived at Vernon, Tex., and was engaged in handling Jersey cows such as these in question; that he had seen 12

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head of the cattle in question, and knew that they were worth from \$30 to \$50 per head, at Vernon, Tex. The railroad company complains that the testimony of the witness Chitwood should be stricken because he testified of the value of the cattle at Vernon, Tex., and not at Snyder. This phase of the case was properly cared for by the court in his instructions to the jury, in which they were told that in determining plaintiff's damage they should not consider any evidence as to the market value of the cattle in question at Vernon, Tex., but that they might consider the physical condition of said cattle when they were received by the defendant at Vernon, Tex., and there was evidence introduced showing the condition of the cattle at the time they were delivered to the company at Vernon, Tex. The railroad company did not attempt seriously to contradict this testimony as to the value of the cattle, but relied seemingly upon the incompetency of the witnesses to testify as to value. Our courts have passed upon the admissibility of this character of testimony, and have held that such witnesses as those who testified were competent and that such testimony was admissible. In *C., O. & G. R. R. Co. v. Deperade*, 12 Okl. 367, 71 Pac. 629, it was held that a person who had been a farmer for 20 years was competent to testify as to the value of animals killed by the railroad company, and that the weight of evidence being a matter to be determined by the jury, it was for the jury to give the proper credit to the testimony of the witness. See, also, *Filson v. Territory*, 11 Okl. 351, 67 Pac. 473, and cases therein cited; *Lawson on Expert and Opinion Evidence*, p. 15. In this class of cases the qualification of witnesses is largely a matter of discretion for the trial court. Without a doubt there was some competent evidence before the jury on the subject of the value of the cattle before and after the injuries complained of. The court covered this phase of the case by fair and comprehensive instructions. The evidence as to the value and damages, while perhaps not as strong and conclusive as it might have been, presented controverted questions of fact which were submitted to the jury under proper instructions, and we cannot say there was no competent evidence before the jury on the subject. There was some, without a doubt.

[2] In such case it is proper to submit the issue to a jury, and it is not the policy of this court to disturb the verdict on appeal. *Edwards v. Miller*, 120 Pac. 996 (not yet officially reported); *Hobbs v. Smith*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Harrill v. Parkinson*, 27 Okl. 528, 112 Pac. 970; *Ellison v. Bank*, 27 Okl. 782, 117 Pac. 199.

The next assignment of error to be noticed is that the court erred in overruling defendant's demurrer to plaintiff's evidence. The main point relied upon by the railroad company under this

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assignment is that there was no evidence offered showing a compliance with the terms of the written contract of shipment, in so far as a written notice for damages having been presented to the company within one day after the arrival of the stock at its destination. That such a provision in a contract of this character is reasonable and binding upon the parties we do not think there can be any question, but we do not agree with the conclusion of counsel for the railroad company that there was no compliance with the terms of the contract in this particular. The evidence shows that the plaintiff, as soon as the shipment arrived at Snyder, unloaded the cattle in the company's stock pen, and immediately went to the depot and informed the agent of the damage done the cattle, and told him that he wanted to put in a claim for damages; that the agent said, "All right;" that the agent in company with the plaintiff, and other witnesses returned to the stock pen and examined the cattle; and that they talked about what it would be and finally decided upon the amount of damages plaintiff claimed; that the agent took down the number and description of each animal and the nature of the injury, together with the amount of the damages, making an itemized statement; that said statement was in writing; that the agent retained the same. In corroboration of this testimony the witness Hellwig testified that on the day of the arrival of the cattle, to wit: May 21, 1907, he was present at the stock pen, and overheard a conversation between Mr. Young and the agent, in which the plaintiff, Mr. Young, said that he would not accept those cattle in a mangled condition, and that he claimed damages and insisted on his claim being filed before he would accept the cattle; that he saw the agent make a list of the cattle and their condition at the time, at Mr. Young's request; that said list was in writing; that the agent had it in his hand and walked to the depot with it; that he saw the paper and what it contained; that he knew it was a claim for damages in the shipment of stock; that he accompanied the agent to the depot; that the agent still had the claim in his hand at the depot; that he conversed with the agent with reference to what he was going to do with it, and that the agent said he "would send it to the company; that it was undoubtedly a just and meritorious claim."

This, without doubt, is a substantial compliance with the terms of the contract complained of by the railroad company. The only purpose of such a provision in a contract is to compel the shippers to immediately inform the company of alleged damages, in order that proper steps may be taken to protect the parties and to prevent fraud. The reason for this rule has been fully met and complied with in the present case, and surely no reasonable person could expect a more full and complete compliance with the requirements of the contract than was performed by

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the plaintiff in the case at bar, and there is no merit in the contention of the railroad company in this particular, but there was, to say the least, a substantial compliance by the plaintiff, with the requirements of the contract of shipment. There was no effort, on the part of any one, to modify, amend or waive the provisions of the contract. On the contrary a substantial compliance with its exact terms was shown by plaintiff.

The next assignment of error complains of the refusal of the trial court to give a certain instruction. No effort has been made to comply with rule 25 of this court (95 Pac. viii), in this connection and therefore it will not be considered. Nor is there any argument made or authorities cited in support of this alleged error; hence the company is deemed to have waived its right to have the same considered here.

The next assignment of error deals with the ruling of the court in refusing to grant a new trial and the same reasons, heretofore assigned and considered, are urged by counsel in this behalf. The jury found, as shown by its verdict, for the plaintiff, in the sum of \$510, and for the defendant on its counterclaim in the sum of \$23, making a total of \$487 for plaintiff. The verdict was right. We find no error in the record of sufficient importance to warrant an interference; on the contrary, we are satisfied that substantial justice has been done, and that the judgment of the county court of Kiowa county, should, in all things, be affirmed.

PER CURIAM. Adopted in whole.

LOOMIS *et al.* v. NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, Nov. 21, 1911.)

[96 N. E. Rep. 748.]

Trial—Evidence Received without Objection—Parol Evidence.—

Where a written contract is clear on its face with no doubt as to its meaning, parol evidence of negotiations preceding its execution can be given no effect, even when received without objection, provided the court is asked to charge that they were merged in the writing.

Evidence—Parol Evidence—Written Contract—Blanks.*—Though a bill of lading for certain potatoes contained blanks unfilled as to

*For the authorities in this series on the subject of the admissibility of parole evidence to contradict or to assist in construing a bill of lading, see *Atlantic Coast Line R. Co. v. Dahlberg Brokerage Co.* (Ala.), 39 R. R. R. 660, 62 Am. & Eng. R. Cas., N. S., 660 (parole evidence was admissible to show that the provision in the bill of lading for delivery to only D. meant, according to the usage by

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the route and as to charges advanced, it was a complete contract and could not be added to by proof that, before the execution of the bill, the parties had agreed by shipping order that the potatoes should be shipped by a particular route, so as to charge the carrier with damages for failure to ship by that route.

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Leslie G. Loomis and others against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (136 App. Div. 913, 120 N. Y. Supp. 1132), affirming a judgment in favor of plaintiffs, defendant appeals. Reversed, and new trial ordered.

See, also, 140 App. Div. 915, 124 N. Y. Supp. 1120.

W. Frederick Strang, for appellant.

Edward P. White, for respondents.

carriers and shippers, that D. was to be notified of the arrival of the goods, but that they were to be delivered only on plaintiff's orders); *Alabama, etc., R. Co. v. Norris* (Ala.), 37 R. R. R. 446, 60 Am. & Eng. R. Cas., N. S., 446 (evidence that agent of defendant carrier agreed with plaintiff that her goods should not be reloaded, but should be shipped through in the same car, was not inadmissible as modifying the contract of shipment; the bill of lading being silent in such respect); *Norfolk & W. Ry. Co. v. Harman* (Va.), 22 R. R. R. 518, 45 Am. & Eng. R. Cas., N. S., 518 (charge that jury must disregard parol evidence in conflict with bill of lading was, for certain reasons, properly refused); *St. Louis, etc., Ry. Co. v. Citizens' Bank* (Ark.), 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290 (whether bill of lading is conclusive evidence of alleged facts recited in it); *Montpelier & W. R. R. v. Macchi* (Vt.), 5 R. R. R. 249, 28 Am. & Eng. R. Cas., N. S., 249 (admissibility of evidence of special agreement to pay freight entered into after delivery of bill of lading); note, 13 Am. & Eng. R. Cas., N. S., 117 (conflict of oral and written contracts for carriage of freight); note, 2 Am. & Eng. R. Cas., N. S., 610 (how far bill of lading is conclusive evidence); note, 10 Am. & Eng. R. Cas., N. S., 341, 13 Am. & Eng. R. Cas., N. S., 36, 20 Am. & Eng. R. Cas., N. S., 709 (parol evidence); *Tallassee Falls Mfg. Co. v. Western Ry.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 455 (evidence of custom to vary stipulation in bill of lading as to time for removal of goods); *Lake Shore, etc., R. Co. v. National Live Stock Bank* (Ill.), 13 Am. & Eng. R. Cas., N. S., 1 (evidence to explain or contradict); *Mouton v. Louisville & N. R. Co.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 673 (testimony of railroad agent to explain technical words); *McElveen v. Southern Ry. Co.* (Ga.), 15 Am. & Eng. R. Cas., N. S., 842; *Stewart v. Cleveland, etc., Ry. Co.* (Ind.), 13 Am. & Eng. R. Cas., N. S., 28.

For the authorities in this series on the question whether a bill of lading is conclusive evidence of the delivery of the freight specified therein to the carrier, see foot-note of *Alabama, etc., R. Co. v. Norris* (Ala.), 37 R. R. R. 446, 60 Am. & Eng. R. Cas., N. S., 446; foot-note of *Brown v. Missouri, etc., Ry. Co.* (Kan.), 39 R. R. R. 224, 62 Am. & Eng. R. Cas., N. S., 224.

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VANN, J. The plaintiffs are dealers in produce residing at Victor, but buying and shipping from Lakeside, N. Y., where they are represented by the firm of Furber, Connell & Norton. D. P. Reynolds & Co. are produce dealers in Jersey City, N. J., where their place of business is in the freightyard of the Lehigh Valley Railroad at Grand street. They sell and deliver produce from the railroad cars as they stand in the yard at that point.

Early in June, 1907, D. P. Reynolds & Co. ordered a car load of potatoes from the plaintiffs at 85 cents per bushel, delivered, payable on presentation of a sight draft with bill of lading attached. When this order was received, the plaintiffs had a car partly loaded with potatoes at Lakeside, and Mr. Furber, their representative, testified that he delivered to the defendant's freight agent at that place a paper on which was written in lead pencil the following: "L. G. Loomis & Son, Grand St., Jersey City, N. J., by L. V. rate 15 c." As Mr. Furber handed this paper to the freight agent, he said: "Here is the instructions for this car of potatoes." This was denied by Mr. Fitz Gerald, the agent of the defendant. The freight agent, however, made out and delivered to Furber a bill of lading in the following form: "New York Central & Hudson River Railroad Company. Received subject to the classification in effect on the date of issue of this bill of lading, at Lakeside Station, 6/12, 1907, from L. G. Loomis & Son, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed in consideration of the rate of freight hereinafter named as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable. Marks: Consignee, L. G. Loomis & Son; destination, Grand St., Jersey City, N. J.; route ———. Charges advanced \$———. Description of articles, C. bulk potatoes S. L. & T. O. K. R E L. Weight subject to correction 24000; 5858, Car No. P M; S E P 12/07. [Signed] D. H. Fitz Gerald, Agent." Beneath this signature of the freight agent was the following: "The rate of freight from ——— to ——— is in cents per hundred pounds * * * fifth class 15. [Signed] D. H. Fitz Gerald, Agent." The various conditions printed on the back are not now material.

At the same time the freight agent made out what is called a

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shipping order, the material part of which is as follows: "New York Central & Hudson River Railroad Company, Lakeside Station, L. G. Loomis & Son, 6/12, 1907. Receive, carry and deliver the articles described below, in accordance with the classification in effect at the date of this order and subject to the conditions of the bill of lading of which this shipping order is a part * * * Marks, Consignee L. G. Loomis & Son, destination Grand St., Jersey City, N. J., route ———; charges advanced \$———; prepay \$———; description of articles, C bulk potatoes S L & T O. K. R el Weight subject to correction, 24000; 5858 Car No. P M Sep. 12/07. (L. G. Loomis & Son, Shipper)." On the back of this shipping order, the same conditions were printed as on the back of the bill of lading. The shipping order, as read in evidence, purports to have been signed, "L. G. Loomis & Son, Shipper," and the freight agent testified that Mr. Furber thus signed it in his presence, but Mr. Furber denied it. The alleged order was retained by the defendant's agent, but the bill of lading was delivered to the agent of the plaintiffs, who mailed it to them at Victor. They wrote on the face thereof the following: "Deliver to the order of D. P. Reynolds & Co. L. G. Loomis & Son." The plaintiffs mailed an invoice to D. P. Reynolds & Co., attached a sight draft on that firm to the bill of lading, and mailed it to the First National Bank of Jersey City for collection. At the same time they gave notice of these facts to the freight agent of the Lehigh Valley Railroad at its Grand street station in Jersey City.

There are two routes for the shipment of freight from Lakeside to Jersey City—one by the defendant's road and that of the Lehigh Valley and the other by the defendant's road and that of the Pennsylvania Railroad Company. At the date of the transaction in question there was "no fifteen cent. rate" from Lakeside to Jersey City according to the Lehigh schedule, although there was one by the Pennsylvania route. The freight stations of the Lehigh Valley and Pennsylvania in Jersey City are about three-fourths of a mile apart, but cars can be transported from one to the other by a somewhat circuitous route, taking about 24 hours. The car containing the potatoes in question was forwarded on the 12th of June, 1907, over the defendant's line to the junction of the Pennsylvania Railroad, and thence over the latter to Jersey City, where it arrived at the Pennsylvania yard on the 18th. The time usually required over the Lehigh route was about two or three days. Upon learning that the car was in the yard of the Pennsylvania Railroad, D. P. Reynolds & Co. telegraphed plaintiffs that they could not handle the potatoes in the yard of that road. On the same day June 18th, the plaintiffs wrote Mr. Ewings, the defendant's general superintendent of freight transportation at his office in the city of New York, stating the facts and adding, "Will you kindly have car delivered at Grand street at once? Let

us hear fully from you at once regarding these shipments." On June 20th Mr. Ewings replied: "We are arranging with our traffic department to have P M 5858 moved to destination via proper junction point and route and will be pleased to advise you later." On the 24th of June the plaintiffs again wrote Mr. Ewings, stating that they were advised by their customer by telegram of even date "that car is still in P. R. R. yards. Will you kindly have this car moved to Grand street, its proper destination at once and wire us when done? We feel that a sufficient length of time has already elapsed in which the same could have been done." On June 25th Mr. Ewings answered, stating that: "Immediately on receipt of your letter the matter was taken up with Mr. R. L. Calkins, our freight claim agent, and on June 22nd he telegraphed the freight claim agent of the P. R. R. I have asked Mr. Calkins to confer with you in the matter." On the 2d of July the plaintiffs wrote Mr. Ewings, stating that they had heard nothing from Mr. Calkins regarding the car, and continued: "We are, however, advised by our customer that the car arrived at Grand street last Saturday and that owing to the long time it was in transit there was now no market for old potatoes; it being too late in the season. He has, therefore, refused same and this is to advise you that the car is at disposal of your company as we shall collect for the value of same through your claim department."

The car was not transported to the Grand street station until June 29th, when D. P. Reynolds & Co. refused to accept it. The potatoes in question were old potatoes for which there is no demand after new potatoes reach the market, or, as one witness stated, "the old potato business is over after the 20th." Moreover, old potatoes loaded in a car sprout and deteriorate rapidly in warm weather. The Lehigh Valley Railroad Company sold the potatoes for less than enough to pay the transportation charges by \$60.78.

This action was brought to recover damages from the defendant for its alleged negligence in not following the shipping directions of the plaintiffs, and in so diverting the car from the route specified thereby as to prevent it from arriving within a reasonable time at the Grand street station, its proper destination.

The defendant alleged in its answer, among other facts, that the bill of lading was a contract, and that the potatoes were transported and delivered pursuant thereto.

Upon the trial the facts were proved substantially as stated, and the court charged the jury, in substance, that, if they found that directions were given to the defendant's agent at Lakeside to ship over the Lehigh road, they should render a verdict in favor of the plaintiffs for \$399.65, the value of the potatoes at 85 cents per hundred pounds, with interest on the balance. They were further told that, if there were no specific directions given to the freight

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agent by Furber to ship over the Lehigh route, their verdict should be for the defendant.

Counsel for the plaintiffs requested the court to charge that: "If the jury find Grand street there (in the bill of lading) means a freight station, failure on the part of the defendant to deliver or tender delivery at that point was a breach of their duty which renders them liable to the plaintiffs in damages." The court thereupon remarked: "I think it depends on whether there was a direction given to ship by the Lehigh directly. I am going to adhere to that." Later, in refusing another request of the plaintiffs, the court said: "I am going to send this case to the jury on the single proposition that, if there was a direction to ship by the Lehigh, the defendant is liable, and, if there was no such direction, the defendant is not liable." The court refused to charge, at the request of the plaintiffs "that the insertion in the bill of lading of the words 'Grand street' if the jury find that it was intended thereby to designate a freight station was a direction to so ship and deliver." The defendant's counsel asked the court to charge "that if Furber, acting for Loomis & Son, signed this shipping order, that thereupon became the direction of the railroad in regard to the shipment of this car." The court remarked: "That is true, but I charge you that if in addition to the memorandum made by the agent, by Fitz Gerald, Furber gave the specified direction to ship over the Lehigh, that it is also a part of the contract." Thereupon defendant's counsel said: "What I wish to have charged is that any directions are merged in this shipping order, if Furber signed it as agent for Loomis." The court asked: "Any direction to ship over the Lehigh? By Defendant's Counsel: Yes, sir. The Court: I decline to charge as requested." An exception was taken to this ruling.

The jury found a verdict for the plaintiffs in the sum of \$399.65, and the judgment entered accordingly was unanimously affirmed by the Appellate Division. The defendant thereupon appealed to this court.

Both the bill of lading and the shipping order were made out by a single operation of a typewriter, manifold paper having been placed between a blank bill and a blank order so arranged that the typewritten part was the same in each. The bill of lading does not refer to the shipping order nor make it a part thereof; but the shipping order expressly states that it is part of the bill of lading. If both papers, although physically detached and separate, had been duly signed, they would have made a contract, and would have constituted the entire contract between the parties. If there is any doubt as to the effect of a bill of lading signed by the carrier only but delivered to and retained by the shipper, it is clear that, when the bill is signed by both parties, it is a contract upon which the minds of both parties have met, and it becomes the sole

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contract between them with reference to the particular shipment involved.

We cannot tell from the verdict, however, whether the shipping order was or was not signed, for the court charged, in substance, that, even if Furber signed the order, still the plaintiffs were entitled to recover if the jury found that he gave the defendant's agent prior oral directions to ship by the Lehigh route, and that such directions, if given, were not merged in the written contract. Thus the position of the court was that whether the shipping order was signed or not, if Furber orally directed the shipment to be made by the Lehigh Valley the plaintiffs were entitled to recover. Hence the jury may have found that Furber signed the shipping order, and also that oral instructions had previously been given to ship by the Lehigh. Thus, following the charge of the court that the oral instructions were not merged in the written order, their verdict would have been logically rendered for the plaintiffs. While the parol directions, including the unsigned memorandum, were received in evidence without objection, this did not preclude the defendant from the right to ask that the jury be properly instructed as to the effect thereof, provided they found that the shipping order was in fact signed by the agent of the plaintiffs.

Thus the question presented is whether a written contract to transport goods from one place to another, duly signed by both carrier and shipper, but silent as to the route, can be varied by evidence of previous parol instructions to ship by a particular route. The answer to this question is too clear to require extended discussion.

[1] No effect can be given to such evidence, even when received without objection, provided the court is asked in due form to instruct the jury that it was merged in the written agreement if they found there was one. In order to prevent fraud, perjury, and mistake, one of the primary rules of evidence forbids that a written contract should be varied by evidence of previous conversations or unsigned memoranda, which are all conclusively presumed to be embodied in the written instrument expressing the final meeting of the minds of the parties. Thus we have recently held, as required by previous decisions on the subject for time out of mind, that "where a written contract is without ambiguity, clear, and complete on its face, with no doubt as to the meaning of any word, no evidence that any term is technical or local, nothing to open the door to proof of extrinsic facts, no effort at reformation either by the pleadings or proof, and the rulings, admitting statements of what was said between the parties before the contract was signed, are not covered by any exception to the general principle of exclusion, parol evidence cannot be received to vary or contradict its terms." *Lossing v. Cushman*, 195 N. Y. 386, 88 N. E. 649.

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The respondents, however, insist that the writing in question does not appear on its face to be a complete contract; that the parol evidence was consistent therewith and not contradictory thereof; and hence that the rule opens to admit such evidence in order to complete an entire contract of which the writing is only a part. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961. It is further insisted that as certain blank spaces in the printed form were left unfilled, such as, "Route ———, Charges advanced \$———," it was competent to fill them by parol.

[2] The writing, however, upon the assumption that it was signed by both parties as the jury may have found, was a contract complete upon its face, for the unfilled blanks were incidental merely, and not essential, to a perfect agreement for the transportation of merchandise by a carrier. Although material, they were not necessary to make the contract complete on its face. There are few written contracts to which some material provision might not be added, yet it would be against the law to hold that they are incomplete on their face. The blank for "Charges advanced" could not be filled, for no charges were advanced, and the effect of leaving the blank space unfilled was the same as if it had been filled by a cipher or by some negative equivalent. The effect of not specifying the route was simply to leave that subject open to the choice of the carrier, which could select any route that it chose. Some shippers do not care what route their goods take, as their object is fully attained by delivery at the place of destination regardless of how they came. Many promissory notes are made out upon printed forms with a blank space for the place of payment, and sometimes with another for the rate of interest, but the contract, even with these spaces unfilled, if complete in other respects, is complete on its face. The provisions suggested by the unfilled blanks are not essential to the validity of the note, because the law takes care of those subjects just as it takes care of the route in a bill of lading when the parties omit to specify it. It would tend to undermine business transactions and render contracts insecure if such blanks could be filled by parol evidence and effect given thereto in an action at law. Such evidence is competent only, and should be given effect only in an action in equity brought to reform the writing, because through mutual mistake, or mistake on one side and fraud on the other, something was omitted which the parties had agreed to. It has no place in the trial of an action at law, such as the one before us, and the refusal of the court to charge that it was merged in the writing, if duly signed, was an error calling for a new trial.

Whether the case should have been sent to the jury upon some other theory, such as was suggested by the counsel for the plaintiffs in his requests to charge, already quoted, is not now before us. It was not thus submitted, but, on the other hand, the theory

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adopted was such that according to the charge and the refusals to charge the verdict may have no foundation to rest upon except an error of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, WERNER, CHASE, and COLLINS, JJ., concur. HAIGHT, J., dissents.

Judgment reversed, etc.

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(Supreme Court of Minnesota, Jan. 26, 1912.)

[134 N. W. Rep. 296.]

(*Syllabus by the Court.*)

Carriers—Injuries to Live Stock—Actions—Presumptions.*—In an action against a common carrier to recover for injuries to horses while in transit, alleged generally to have been caused by rough and negligent handling by defendant, a presumption of negligence arises when plaintiff proves delivery to the carrier in good condition and receipt at destination in an injured condition.

Carriers—Injuries to Live Stock—Actions—Presumptions.†—The fact that the owner or his agent accompanies the horses relieves the carrier from special care and oversight of the animals, but does not change the presumption, unless it is shown that the injury was caused by the negligence of the owner or his agent. The verdict in this case held sustained by the evidence.

Carriers—Transportation of Personal Property—Limitation of Liability.‡—Where a shipper and carrier fairly and honestly agree as to the value of the property to be shipped, as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the values so agreed

*See first foot-note of *Rick v. Wells Fargo Co.* (Utah), 41 R. R. R. 562, 64 Am. & Eng. R. Cas., N. S., 562; third foot-note of *Union Pac. R. Co. v. Stupeck* (Colo.), 40 R. R. R. 748, 63 Am. & Eng. R. Cas., N. S., 748; last foot-note of *Baltimore, etc., R. Co. v. Clift* (Ky.), 40 R. R. R. 285, 63 Am. & Eng. R. Cas., N. S., 285.

†See extensive note, 26 R. R. R. 312, 49 Am. & Eng. R. Cas., N. S., 312.

‡See last foot-note of *Gardiner v. New York Cent., etc., R. Co.* (N. Y.), 40 R. R. R. 765, 63 Am. & Eng. R. Cas., N. S., 765; second head-note of *Union Pac. R. Co. v. Stupeck* (Colo.), 40 R. R. R. 748, 63 Am. & Eng. R. Cas., N. S., 748; last foot-note of *Louisville & N. R. Co. v. Smith* (Tenn.), 40 R. R. R. 291, 63 Am. & Eng. R. Cas., N. S., 291; second head-note of *Pierson v. Northern Pac. Ry. Co.* (Wash.), 39 R. R. R. 303, 62 Am. & Eng. R. Cas., N. S., 303.

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upon will be the limit of recovery. In this case it is held that the evidence does not show that the shipper and carrier agreed on the valuation of the horses.

Admission of Evidence—Instructions.—There were no errors in the rulings on the admission of evidence, in the instructions to the jury, or in the refusal to give instructions requested.

(Additional Syllabus by Editorial Staff.)

Trial—Reception of Evidence—Striking Out Offer of Proof.—It is not error to refuse to strike out an offer to prove certain facts, the objection to which was sustained.

Trial—Reception of Evidence—Scope of Objections.—In an action for injuries to a shipment of horses, there was no error in receiving in evidence a receipt for the horses by the consignee, which had written across the front a statement by a freight inspector of the carrier that he had inspected the horses and found five of them with one swollen leg each, "apparently had rough handling in transit," over the objection that the evidence was immaterial and irrelevant; such objection being insufficient to raise the point that it was hearsay.

Appeal from District Court, Hennepin County; John H. Steele, Judge.

Action by Edward C. Cole and others against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From an order denying a motion in the alternative for judgment notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

John L. Erdall and *L. K. Eaton* (*A. H. Bright*, of counsel), for appellant.

S. Meyers, for respondents.

BUNN, J. This action was brought to recover damages for injuries to five horses, claimed to have been caused by defendant's negligence while the horses were in its possession as carrier. The complaint alleged that ten horses belonging to plaintiffs were delivered in good condition to defendant at Trout Lake, Wis., to be transported to Minneapolis; that defendant handled the horses roughly and carelessly in transporting them; and that through its negligence five of the horses were bruised, maimed and injured, to plaintiff's damage in the sum of \$1,400. The answer admitted that plaintiffs delivered the horses to defendant for shipment, alleged that it transported them to Minneapolis without negligence, and that the transaction was under and pursuant to the regulations and tariffs of defendant, and a special contract relating to the liability of defendant, which contract was set out in the answer. The case was tried and submitted to the jury, after defendant's motion for a directed verdict had been denied. The verdict was in plaintiff's favor in the sum of \$575. De-

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fendant moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appealed from the order denying such motion.

[1] 1. It is contended that the verdict is not sustained by the evidence. Defendant's argument in this regard may be thus summarized: The complaint charged specific acts of negligence; therefore the burden was on plaintiffs to establish the negligence charged, and proof of the good condition of the horses when delivered to the carrier, and their delivery by the carrier in an injured condition, is not sufficient to make a prima facie case. In any event this presumption does not apply to live stock shipments, where the owner or his agent accompanies the stock to look after it. The argument is unsound for several reasons. In the first place, the complaint does not allege specific acts of negligence, but alleges generally rough and negligent handling of the horses. Secondly, there was evidence tending, not only to show the injured condition of the horses when received at Minneapolis, but unusual and severe jolts and bumps during the journey, such as might cause such injuries..

[2] Nor does the fact that an agent of the owner accompanied the stock relieve the carrier from the exercise of care to avoid injuring the animals, or change the rule that a prima facie case of negligence is made when the owner shows the delivery of the property in good condition to the carrier, and that loss or damage has been suffered during its transit. The carrier is relieved from special care and oversight of the animals when the owner or his agent accompanies them, but where an injury results without the fault of such owner or his agent, and from causes other than inevitable accident, the same presumption of negligence arises as in other cases. *Boehl v. C., M. & St. P. Ry. Co.*, 44 Minn. 191, 46 N. W. 333. An examination of the record discloses abundant evidence of serious injuries to the horses while in transit, and there is no suggestion that these injuries were due to any want of care or attention on the part of plaintiff's agent. In addition there was evidence, as before stated, tending to show severe and unusual bumping and jolting of the cars in the train. The evidence made a case for the jury, and was sufficient to support the verdict.

[3] 2. Defendant contends that in the contract of shipment the parties agreed upon a valuation of \$100 upon each horse, and that, as plaintiffs conceded that the five injured horses were worth \$350 on their arrival at Minneapolis, plaintiffs were in no event entitled to a verdict for more than \$150. Conceding that the instruction requested by defendant was sufficient to raise the question, we are of the opinion that defendant's contention is unsound. It is the law of this state that, if the shipper and carrier agree as to the value of the property to be shipped, and the agree-

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ment is made fairly and honestly as the basis of the carrier's charges and responsibility, and not for the purpose of limiting the amount for which the carrier shall be liable for losses resulting from its negligence, such agreement is valid, and the valuations so agreed upon will be the limit of recovery. *Alair v. N. P. Ry. Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588. But in the case at bar the parties did not stipulate or agree as to the value of the horses. The contract recites that: "The rates provided in the tariffs of this company are based upon the following value of animals named, to wit: "\$100 on each horse, \$30 on each cow," etc. It then provides that when the declared value exceeds the above, or when the owner declines to declare the value, an addition to the rate will be made. Then follows this language:

"It is agreed that the value of these animals does not exceed the amount set forth in this contract, and the shipment covered by his contract is accepted and forwarded subject to such agreed valuation, as follows:

Each horse or pony.....	\$_____
Each cow.....	\$_____"

The blanks left for the insertion of the valuation agreed upon were not filled in. For all that appears from the contract, the value of the horses shipped was never stipulated or agreed upon. The statement that the rates provided in the tariffs of the company are based upon stated valuations can in no way be construed as an agreement fixing the values of the horses shipped. It is not a statement that the rates charged the shipper were based upon such valuation. Such rates may have been based upon a greater valuation declared by the shipper, or upon his failure to declare the value of the stock. We hold, therefore, that the trial court correctly declined to instruct the jury on the subject of this contract.

[4-6] 3. Certain assignments of error challenge rulings of the trial court as to the admission of evidence. It was not error to refuse to strike out an offer of plaintiff's counsel to prove certain facts, the objection to which offer was sustained. Nor was it error to receive in evidence Exhibit A, which purported to be a receipt for the horses by the consignee, and had written across the front a statement by a freight inspector of defendant that he had inspected the horses in the consignee's barn and "found five of them with one swollen leg each, apparently had rough handling in transit." The objection made was that the evidence was "immaterial and irrelevant," and was insufficient to raise the point, which defendant here urges, that it was hearsay. The claim of "misconduct of counsel" relating to this statement was a matter for the trial court to determine, and we find no ground for a new trial here. It was within the discretion of the trial court

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to permit certain witnesses to testify for plaintiff in rebuttal, and we find no abuse of discretion in this respect.

4. There was no error in the charge, or in the court's refusal to give instructions requested by defendant. The more important of the questions raised by the assignments of error in the instructions given and refused have been already disposed of in this opinion. The others involve either verbal inaccuracies, or requests covered by the charge. On the whole, the instructions given clearly and correctly submitted the issues to the jury.

Order affirmed.

 FT. SMITH & W. R. CO. *v.* WILLIAMS.

(Supreme Court of Oklahoma, Jan. 16, 1912.)

[121 Pac. Rep. 275.]

Carriers—Shipment of Freight—Delay—Damages.*—Where a carrier contracts with a shipper to deliver certain machinery, a merry-go-round, to a certain place by a certain day for a specific purpose, and has full notice of the nature of the purpose, is fully warned of the use to which the machinery is to be put, and of the importance of having it there on the particular day specified, and of the damage or loss of earnings which would result from failure to deliver same on the day agreed upon, and undertakes such shipment with full knowledge that such conditions and the expected earnings are the moving motive on the part of the shipper, and thereupon through want of diligence fails to deliver such machinery until after the day agreed upon, and after the time has expired when such machinery can be operated with any profit, such carrier is liable in such amount as will reasonably compensate the shipper for damage alone. And, if the amount of earnings or profits can be estimated with a reasonable degree of accuracy, they then become the most just and adequate measure of damages.

(Syllabus by the Court.)

Commissioners' Opinion, Division No. 2. Error from Marshall County Court; J. W. Falkner, Judge.

Action by J. P. Williams against the St. Louis & San Francisco Railroad Company, a corporation, and the Ft. Smith & Western Railroad Company, a corporation. Judgment for plaintiff, and defendant Ft. Smith & Western Railroad Company brings error. Affirmed.

*See foot-note of *Virginia Carolina Peanut Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 41 R. R. R. 573, 64 Am. & Eng. R. Cas., N. S., 573; last foot-note of *Southern Ry. Co. v. Moody (Ala.)*, 39 R. R. R. 319, 62 Am. & Eng. R. Cas., N. S., 319.

Ft. Smith & W. R. Co. *v.* Williams

This action was filed in the county court of Marshall county December 7, 1908, by J. P. Williams against the St. Louis & San Francisco Railroad Company and the Ft. Smith & Western Railroad Company for damages for failure of the two carrier companies to deliver a certain merry-go-round from the town of Indianola, Okl., to Madill, Okl., within time to be used by plaintiff at a picnic held in Madill, Okl., on August 14 and 15, 1908. On August 10, 1908, plaintiff, J. P. Williams, tendered for shipment to the Ft. Smith & Western Railroad Company at Indianola, Okl., the merry-go-round in question, the same being accepted by said railroad company under an agreement between plaintiff and said company that said property would be delivered to plaintiff at Madill, Okl., not later than the morning of the 14th of August, and was loaded for shipment August 10th. The Ft. Smith & Western Railroad Company delivered same to the St. Louis & San Francisco Railroad Company at Weleetka, Okl., and the St. Louis & San Francisco Company carried it from Weleetka to Madill; the same reaching Madill about 5 o'clock in the evening of August 14th. The evidence shows that the defendant Ft. Smith & Western Railway Company was informed of the nature of the shipment and of the necessity for having the merry-go-round at Madill in time for use on the morning of the 14th of August, and that it was fully explained to the defendant company by plaintiff that plaintiff was going to use said merry-go-round at Madill during the two days picnic, and particularly and definitely informed plaintiff that he wanted it to reach Madill in time to be put up and ready for use on the morning of the 14th of August; that being the first day of the two days picnic. The waybill issued by the defendant company to plaintiff, a copy of which is made a part of the record, bears this notice: "Please hurry through. Must be at Madill by the 8-14." From the evidence in the record the distance from Indianola over the Ft. Smith & Western Railway to Weleetka is 28 miles, and the distance from Weleetka over the St. Louis & San Francisco Railway to Madill is 109 miles. It also appears from the evidence that the merry-go-round was received by the St. Louis & San Francisco Railroad Company at Weleetka some time during the evening of August 13th, and was handled or forwarded by such company on the first train out to Madill, reaching Madill over the Frisco about 5 o'clock on the evening of the 14th, having been three days in transit from Indianola to Weleetka, a distance of 28 miles, and having been carried by the Frisco road, a distance of 109 miles, in something like 24 hours time. The plaintiff below sued for \$425, alleging that he had been damaged in the sum of \$400 in loss of profits and the sum of \$25 in amount paid as license to run his machine at Madill, and that all of such losses were the direct result of the negligence and unnecessary delay in shipment by the defendant carriers.

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Each of the defendant carriers appeared and filed their separate answers to plaintiff's petition; the same being, in effect, general denials of the allegations contained in the petition. Upon a trial of the cause, which was had to a jury, the plaintiff obtained a verdict against the Ft. Smith & Western Railroad Company for \$200, the court having peremptorily instructed the jury to return a verdict releasing the San Francisco Railway Company from any liability, upon which verdict the court rendered judgment in favor of plaintiff and against defendant Ft. Smith & Western Railroad Company in the sum of \$200, from which judgment and order of court overruling the motion for new trial the Ft. Smith & Western Railroad Company appeals to this court.

C. E. Warner and *H. P. Harper*, for plaintiff in error.

F. E. Kennamer and *Chas. A. Coakley*, for defendant in error.

HARRISON, C. (after stating the facts as above). Plaintiff in error complains of 19 separate assignments of error, but in his brief discusses and reviews them all under three general heads, viz.: First. It was error for the court to admit evidence tending to show, and to instruct the jury, that plaintiff was entitled to recover the profits which he alleges he would have received. Second. The court erred in refusing to give instruction No. 1, asked by the defendant, which reads as follows: "You are instructed that upon the evidence in this case it is your duty to return a verdict for the defendant, Ft. Smith & Western Railroad Company." Third. The measure of damage in any event could not be the gross receipts; but plaintiff's recovery should have been limited to the net receipts. These three propositions are all included in the one general proposition "whether a loss of contemplated profits is a proper element of damage."

This has ever been looked upon and treated by the courts as a vexed and difficult question. It has been, and will always be, impossible to lay down any fixed and definite rule correctly applicable in all cases. There has never been a rule established which was decisive and universally followed by the courts in all cases, but the inclination of the earlier authorities to hold that contemplated profits per se were improper elements of damage has given way under the riper wisdom of jurisprudence, and, instead of holding to the earlier inclination, the weight of authorities in modern jurisprudence either holds or concedes that, where a loss of profits is not too remote or conjectural to be susceptible of computation with reasonable accuracy, they are proper elements of damage. This rule is recognized with approval by each and all of the following authorities cited by counsel for plaintiff in error in support of his first proposition: *Strawn v. Cogswell*, 28 Ill. 461; *Perry Frazer et al. v. S. F. Smith et al.*, 60 Ill. 145; *Galveston, H. & S. A. R. Co. v. Jessee*, 2 Willson, Civ. Cas. Ct.

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App. § 405, and authorities cited; *People's Savings Bank of Waterloo v. C. F. Transit Co. et al.*, 118 Iowa, 740, 92 N. W. 691; *Bartow v. Erie R. Co.*, 73 N. J. Law, 12, 62 Atl. 489; *H. & T. C. R. R. Co. v. George A. Hill*, 63 Tex. 381, 51 Am. Rep. 462; *Western Union Telegraph Co. v. Jewse Crall*, 39 Kan. 580, 18 Pac. 719; *Moulthrop et al. v. Hyett et al.*, 105 Ala. 493, 17 South. 33, 53 Am. St. Rep. 139; *Williams v. Island City Mercantile & Milling Co.*, 25 Or. 573, 37 Pac. 51; *Brigham & Co. v. Carlisle*, 78 Ala. 244, 56 Am. Rep. 28; *Gas Co. v. Glass Co.*, 56 Kan. 622, 44 Pac. 621; *Cutting v. Miner*, 30 App. Div. 457, 52 N. Y. Supp. 288; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Western Gravel Road Co. v. Cox et al.*, 39 Ind. 263; *Florida Northern Railway Co. et al. v. Southern Supply Co.*, 112 Ga. 1, 37 S. E. 130; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 55; *Pollock & Co. v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Witherbee v. Meyer*, 155 N. Y. 446, 50 N. E. 58. In each of the above cases the rule had been either rejected or followed in the lower courts, and the appellate courts in reversing the judgment where the rule had been followed, or in affirming the judgments where the rule had been denied, did so purely upon the ground that the profits contended for in such cases were entirely too remote, speculative, and conjectural to be estimated with any degree of accuracy, and not upon the ground that, though the profits might be estimated with a reasonable degree of certainty, they were per se improper elements of damage.

In the case of *Gas Co. v. Glass Co.*, 56 Kan. 622, 44 Pac. 621, cited by plaintiff in error, Mr. Justice Johnson in rendering the opinion says: "It is urged that damages cannot be measured by the anticipated profits, as the calculation is necessarily based on conjecture rather than upon facts. It is the aim of the law to give the party injured by the breach of the contract all damages which he may have suffered by such breach; and, where the contract is made with a view to future profits and such profits are within the contemplation of the parties, they may, where they can be established with certainty, form a just measure of damages. It has been said that as a general rule, with a few exceptions, anticipated profits prevented are not recoverable in the way of damages for the breach of contract; but it is well settled in this state that damages based upon prospective profits which would have been realized had the contract been performed may be allowed, providing they are fairly within the contemplation of the parties, are the direct and natural consequence of the breach of the contract, and are susceptible of being ascertained with reasonable certainty"—citing *Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; *Town Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706. In the case of *Williams v. Island City Mercantile Company*, 25 Or. 573, 37 Pac. 49, cited by plaintiff in error, Mr.

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Justice Bean in rendering the opinion says: "The object of damages is, primarily, compensation to an injured party for a loss sustained; and the rule is, primarily, that only such damages can be recovered as are the natural and proximate result of the breach, and that the damages which are purely speculative or conjectural are not recoverable. But the application of this rule varies as much as the facts of the adjudged cases in which it has been applied. There is nothing in the term 'profits' which of itself excludes their being given in evidence, and used as the measure of damages; but, when excluded, it is because they are either unnatural or remote, or there is no criterion by which to estimate them with that certainty which the law requires. Indeed, in many cases, profits are the only certain or reliable measure of damages. * * *" In case of *Moulthrop v. Hyett*, cited by plaintiff in error above, Mr. Justice McClellan, in rendering the opinion of the Supreme Court of Alabama, says: "It seems reasonable that, where profits are thus lost, the defaulting party should make them good, for the machine is purchased with a view to the profits, and the contract would not be entered into if the profits were not expected and counted upon. But the difficulty in measuring damages by profits is that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of the contract. When that is the case, they are said to be too remote, and the damages must be estimated on the consideration of such elements of injury as are most directly and certainly the result of the failure of performance. But in some cases profits are the best possible measure of damages, for the very reason that the loss is indisputable and the amount can be estimated with almost absolute certainty."

None of the above authorities have held against the justness of the rule of applying profits as a measure of damages, but have merely held it inapplicable to the cases decided. There is more or less inaccuracy in every action for damages for breach of contract, but in order to justify a recovery in any case, assuming that a breach has been committed, there are two necessary elements to be considered: One that a damage has been done; the other that such damage is the result of the breach. The amount of the one should be computed with reasonable accuracy. The fact of the other must be determined with reasonable certainty. A less degree of accuracy is required in the former than of certainty in the latter, but neither is required to be absolute or beyond conjectural possibilities. Where it reasonably appears that a party has been damaged, and that such damage is the direct result of the breach, then a recovery is justified. The next step is to ascertain how much will reasonably compensate the injured party. This should be computed by the plainest, easiest, and

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most accurate measure which will do justice in the premises, and if from the conditions in the contract, and the nature of the breach, it reasonably appears that the extent or amount of damages may be more readily, easily, correctly, and justly ascertained by applying the loss of profits as a measure, if it is evident that profits were lost and the amount thereof can be calculated with reasonable accuracy, then such profits are the true measure to be applied. In such cases, however, it should appear evident that profits were lost. The amount may be estimated with only reasonable accuracy; but the fact that profits were lost should require stricter proof. This doctrine is deduced from a vast weight of authorities both American and English including 2 Joyce on Damages, and authorities; 1 Sutherland on Damages (3d Ed.) and notes and cases cited; 1 Sedgwick on Damages (8th Ed.); 8 Am. & Eng. Enc. (2d Ed.), and authorities cited in notes; 13 Cyc. and cases cited; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Blagen v. Thompson, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Brown v. Hadley, 43 Kan. 267, 23 Pac. 492; Hoge v. Norton, 22 Kan. 374; Hadley v. Baxendale, 9 Exch. 341; 26 Eng. L. & Eq. 398 (a leading case both in England and America); Tootle v. Kent, 12 Okl. 674, 73 Pac. 310; Choctaw Ry. Co. v. Jacobs, 15 Okl. 493, 82 Pac. 502; Mace v. Ramsey, 74 N. C. 11; Butler v. Manhattan R. R. Co., 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738; Bluegrass Cordage Co. v. Luthy, 98 Ky. 583, 33 S. W. 835; Simpson v. London, etc., R. Co., I. Q. B. Div. 274.

Hence we conclude that where a carrier contracts to deliver certain machinery to a certain place by a certain day for specific purposes, and has full notice of the nature of the purpose, is fully warned of the use to which the machinery is to be put, and of the importance of having it there on the particular day specified, and of the damage or loss of earnings which would result from failure to deliver same on the day agreed upon, and undertakes such shipment with full knowledge that such conditions, and the expected earnings are the moving motive on the part of the shipper, and thereupon through want of diligence fails to deliver such machinery until after the day agreed upon, and after the time has expired when such machinery can be operated with any profit, such carrier is liable in such amount as will reasonably compensate the shipper for the damage done. And, if the amount of earnings or profits can be estimated with a reasonable degree of accuracy, they then become the most just and adequate measure of damages.

This we think correctly presents the real conditions of the case at bar. The plaintiff herein owned the merry-go-round. It was at Indianola on the day the contract was entered into. There

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was going to be a two days picnic at Madill, Okl. Plaintiff had purchased a right from the picnic committee to operate his machine there during the two days. He informed the carrier of all these circumstances, and asked the carrier if delivery of the machinery could be made by at least one day before the picnic began, or in time to have the merry-go-round ready for operation on the morning of the first day of the picnic. The agent of defendant company fully understood from the evidence in the record, undenied, all the conditions involved in the case, fully understood the importance of having the machinery at Madill on the first day of the picnic, and understood that it would be worthless for operation if it failed to reach Madill until after the picnic was over, and with this understanding promised plaintiff that he would deliver the machinery on time. And thereupon, with this understanding between the parties, plaintiff delivered the machinery to the defendant company for shipment to Madill. These facts are undisputed in the record. It also appears from the record that the machinery in question was turned over to defendant for delivery on the 10th of August, and that defendant company was nearly four days shipping such machinery a distance of only 28 miles from Indianola to Weleetka, no excuse whatever being given for the delay; that on the evening of the 13th it was delivered by defendant company to the Frisco Company and by the Frisco Company, within the next 24 hours, delivered a distance of 109 miles to consignee at Madill, reaching Madill near the close of the first day of the picnic. The evidence showed, also, that plaintiff upon receipt of the machinery immediately set to work with a number of hands and worked all night in order to get the machinery ready for operation, but failed to do so until between 9 and 10 o'clock of the last or second day of the picnic.

The record further discloses that the number of people present on the first day was, if any difference, greater than on the second day. It showed, also, that the plaintiff, after getting his machinery ready for operation, at about 10 o'clock the second day, from about 10 o'clock on the morning of the second day to the close of the evening of the same day, took in \$245. The plaintiff claimed that he lost \$400 by reason of not having his machinery ready as agreed upon. He testified that he would have taken in \$400 more had he had his machinery ready for operation during the whole of the two days. This testimony, of course, was a mere supposition, and not to be treated as a basis upon which to compute the amount of damages. But the fact that he took in \$245 during a little more than two-thirds of the second day, and the witness Jorden, who operated the machine and who had been operating merry-go-rounds for seven years, testifying that the

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net profits of the time lost on the second day would have been at least \$40, reckoning from what had been taken in during the remaining portion of the day, and the fact that the crowd was larger, if any difference, on the first day than on the second, it appears to be reasonable that under ordinary circumstances he would have taken in \$200, the amount of the judgment, during the one and one-third days lost to him. The record shows there were 2,500 to 3,000 people present each day; that there was no other merry-go-round on the grounds; that the receipts were from \$1 to \$5 each run of the machine; that a run lasted three to four minutes. This, it seems to us, would offer a reasonable basis upon which to estimate an approximate loss. It is not unreasonable to suppose that the receipts would have been approximately the same on the first as on the last day. Had he been able to run all of the second day at the same rates which he did run, his receipts would have been from \$325 to \$360. Hence we do not feel that it would be unreasonable for the jury to say from all the facts before them that defendant was damaged at least \$200 for the one and one-third days lost. It would appear more unreasonable and conjectural and more out of harmony with business experience and common judgment to say that he would not. And in view of all the circumstances we think the verdict is not the result of mere guesswork or conjecture, but that it is fair, reasonable, and should be allowed to stand.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

MISSISSIPPI R. R. COMMISSION *v.* YAZOO & M. V. R. Co.

(Supreme Court of Mississippi, Dec. 18, 1911.)

[56 So. Rep. 668.]

Appeal and Error—Hearing of Causes—Advancement.—Under Code 1906, § 4907, providing for the advancement of certain causes on appeal, the State Railroad Commission is not entitled to advancement of hearing of its appeal from a decree enjoining enforcement of an order against railroad companies.

Railroads—Regulation—Orders of Railroad Commission—Validity.—For an order of a railroad commission, directing a railway company to do a certain thing, to be reasonable and enforceable, the thing ordered to be done must be within the purposes for which the railroad was chartered, or within the scope of the business in which it is engaged.

Constitutional Law—Due Process of Law—Orders of Railroad Commission—Validity.—An order of the State Railroad Commis-

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sion, requiring two railroad companies to make physical connection at a certain point, is unreasonable and unenforceable, as constituting a deprivation of property without due process of law, where its enforcement would merely result in the furnishing by each road to the other of terminal facilities; the roads being engaged in transporting freight and passengers, and not in switching or transfer service for, or furnishing terminal facilities to, other roads.

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Action by the Yazoo & Mississippi Valley Railroad Company against the Mississippi Railroad Commission. Decree for plaintiff, and defendant appeals. Affirmed.

The Yazoo & Mississippi Valley Railroad Company sued out an injunction to restrain the enforcement of an order of the Railroad Commission requiring it and the Southern Railway Company to connect their tracks at Hollandale, a station situated on the line of both railways, where the two ran parallel. The chancellor granted a perpetual injunction, and the Railroad Commission appeals. At the March, 1911, term of the Supreme Court the appellant filed a motion to advance the cause on the docket as a preference case, which motion was overruled on May 22, 1911. Thereafter, at the October, 1911, term of said court, the case was argued and submitted.

Watson & Jayne, Alexander & Alexander, Chalmers Alexander, and Jas. R. McDowell, Asst. Atty. Gen., for appellant.

Mayes & Longstreet and Chas. N. Burch, for appellee.

MAYES, C. J. [1] The motion of the Attorney General to advance the hearing of these cases on the docket of this court must be denied. The cases are not preference causes within the rule laid down in *Jackson Loan & Trust Co. v. State*, 96 Miss. 347, 54 South. 157, construing section 4907 of the Code of 1906. If oral argument is not desired by counsel on either side, the cases may be submitted at any time. The decision at this term will likely follow.

SMITH, J. At Hollandale, Miss., and for some distance north and south thereof, the Yazoo & Mississippi Valley and Southern Railroads run near to and parallel with each other. An oil mill belonging to the Grenada Oil Mill Company is located at Hollandale, on the line of the Yazoo & Mississippi Valley Railroad. Desiring to have these railroads physically connected, so that cars might be switched from the Southern Railroad to its oil mill, the Grenada Oil Mill Company requested an order from the State Railroad Commission, under the provisions of section 4895 of the Code, directing such connection to be made, which

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request was by the Commission granted, and the following order passed: "This case came on this day to be heard on the petition of the Grenada Oil mill to require said roads to connect their tracks at Hollandale, and due notice having been given all parties, and all parties being represented, after full hearing, it is ordered that said petition be granted, and that said roads be and are hereby required to connect their tracks, as prayed for; said roads to share proportionately the cost of said connection. The same to be done by September 1, 1908."

The physical connection of these roads at this point is not necessary in order that cars in transit may be transferred from one road to the other, for such connections between the roads exist at other places. If enforced, this order would serve two purposes only: First, that cars loaded by shippers at Hollandale on sidings located on one of these roads could be switched to the other for transportation to points of destination; and second, that cars brought to Hollandale by one road could be switched to the other and unloaded more conveniently by consignees. In other words, its enforcement would result simply in the furnishing by each road to the other of terminal facilities. After the making of this order, appellee, upon the filing of its bill in the court below, obtained an injunction temporarily enjoining the enforcement thereof, which injunction, upon final hearing, was made perpetual; hence this appeal.

The right of the state to regulate railroads within reasonable limits is not, and could not be successfully, challenged by appellee. Its complaint, among other things, is that the order in question is an unreasonable exercise of this power, constituting, in fact, an attempt to deprive it of its property without due process of law. It may also be noted that the right of the state to enforce the use of union terminal facilities is not here involved. In *Wisconsin, etc., R. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194, the Supreme Court of the United States, in deciding that an order of a state railroad commission, directing the making of a physical connection between two railroads necessary, in order that cars or freight in transit could be transferred from one road to the other, did not deprive either road of its property without due process of law, said: "While this power of regulation exists, it is also to be remembered that the Legislature cannot, under the guise of regulation, interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. * * * The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised. * * * Taking the facts which we have already enumerated into consideration, we think there is no

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justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both, such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action. We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error."

[2, 3] For an order of a railroad commission, directing any railroad company to do a certain thing, to be reasonable, the thing ordered to be done must, among other things, be within the purposes for which such railroad was chartered or within the scope of the business in which it is engaged. The business for which appellee was chartered, and in which it is engaged, is that of transporting freight and passengers from one point to another, and not that of doing switching or transfer service for, or furnishing terminal facilities to, other roads. This order, therefore, constitutes an unreasonable and arbitrary exercise of the power to regulate, and its enforcement would result in depriving appellee of its property without due process of law.

Affirmed.

ST. LOUIS, I. M. & S. R. Co. et al. v. PAPE et al.

(Supreme Court of Arkansas, July 3, 1911.)

[140 S. W. Rep. 265.]

Carriers—Contracts—Validity—Limiting Liability.*—Under the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and amendment (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]) thereto, any contract limiting the liability of a carrier of property transported in interstate commerce, in case of loss, to a stated maximum amount is void.

Evidence—Res Gestæ—Declarations after Event.—R., a person in a freight car when it caught fire, went 1,600 feet to the caboose, and after he had told D., the shipper's agent, of the fire, and D. had gone to it, being asked by a brakeman how the car got on fire, said, "Don't know how it got on fire, without it got on fire from the lantern," referring to a lantern D. had in the car; and after D.'s return made the same answer to the same question by D.; and, on D. saying, "I turned the lantern out when I left," said: "No; you didn't turn it out. You turned it down low, but you didn't turn it out." To which D. replied: "Yes; I did." Held, that from the time and manner in which statements were made they were not so proximate as to grow out of the occurrence, and so closely connected with it as to constitute a part of the transaction, and so were not a part of the *res gestæ*, admissible as evidence of the origin of the fire.

Carriers—Loss of Goods—Cause—Burden of Proof.†—The carrier of goods being, in the absence of a valid special contract, an insurer thereof against all losses, except those arising from the act of the shipper, and certain other acts, the carrier, claiming that the

*For the authorities in this series on the subject of the right of a common carrier to limit its liability to a specified amount, see last foot-note of *Gardiner v. New York Cent. & H. R. R. Co.* (N. Y.), 40 R. R. R. 765, 63 Am. & Eng. R. Cas., N. S., 765; second head-note of *Union Pac. R. Co. v. Stupeck* (Colo.), 40 R. R. R. 748, 63 Am. & Eng. R. Cas., N. S., 748; last foot-note of *Louisville & N. R. Co. v. Smith* (Tenn.), 40 R. R. R. 291, 63 Am. & Eng. R. Cas., N. S., 291; second head-note of *Pierson v. Northern Pac. Ry. Co.* (Wash.), 39 R. R. R. 303, 62 Am. & Eng. R. Cas., N. S., 303; last foot-note of *Berry v. Chicago, etc., Ry. Co.* (S. Dak.), 35 R. R. R. 615, 58 Am. & Eng. R. Cas., N. S., 615.

†See first foot-note of *Rick v. Wells Fargo Co.* (Utah), 41 R. R. R. 562, 64 Am. & Eng. R. Cas., N. S., 562; last foot-note of *Baltimore, etc., R. Co. v. Clift* (Ky.), 40 R. R. R. 285, 63 Am. & Eng. R. Cas., N. S., 285; foot-note of *Estes v. Denver, etc., R. Co.* (Colo.), 40 R. R. R. 216, 63 Am. & Eng. R. Cas., N. S., 216; *Patterson v. Missouri, etc., Ry. Co.* (Okla.), 35 R. R. R. 410, 58 Am. & Eng. R. Cas., N. S., 410.

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loss arose from an act of the shipper, has the burden of proving it, and this, though the shipper accompanied the goods; and it is only when the loss is shown to have originated from an act of the shipper, and he seeks to hold the carrier in the ground of its subsequent negligence in not avoiding or lessening the damage, that he has the burden of proof.

Trial—Instructions—Waiver of Objection.—Where, on the trial in an action by a shipper against a carrier for the burning of the goods in transit, both parties proceeded on the theory that if the fire originated from the act of the shipper's agent in handling a lantern such act was negligence, and no objection was made to the use of the word "negligence" in the instructions, given at plaintiff's request, that defendant was liable if it had not proved the loss was by reason of the alleged neglect of the plaintiff, and that it had the burden of proving its defense that the fire was caused by the negligence of plaintiff's agent, objection on that account was waived.

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Consolidated action by C. W. Pape and others against the St. Louis, Iron Mountain & Southern Railway Company and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

W. E. Hemingway, E. B. Kinsworthy, H. S. Powell, and Jas. H. Stevenson, for appellants.

W. H. Arnold, for appellees.

FRAUENTHAL, J. These were six separate actions instituted by the appellees to recover the value of a lot of personal property which was destroyed by fire while being transported by appellants as a common carrier. The property consisted of a lot of household goods, wearing apparel, and some live stock, portions of which were owned by the several appellees, and all of which was shipped in the same car and destroyed on the same occasion. The property was carried under the same contract of shipment in the name of one of the appellees as consignee, but for the benefit of all of them, who paid their respective portions of the freight charges. The six actions were consolidated for trial.

On February 11, 1910, the property was delivered to the Louisville & Nashville Railroad Company at McLainsboro, in the state of Illinois, to be transported to Ogden, in the state of Arkansas, and a bill of lading was duly issued therefor by the initial carrier. At the same time, a contract, known as a "live stock contract," was executed, and also signed by the shipper, which provided that the "shipper or his agent or agents in charge of said animals shall ride upon the freight train upon which said animals are transported." The property was shipped in a box car, in which there was no opening, except sliding doors upon

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each side. The household goods were placed in one end of the car, and the stock was placed in the other, and between the two and the doors was placed a quantity of hay and other feed stuffs.

The shipper employed one Ed Denton to accompany the property, and he rode in the car with it. It appears that a boy named W. H. Rose, who was well acquainted with the shipper, desired to go to Arkansas, and, without the knowledge or consent of the shipper or Denton, stowed himself away in the car and traveled with the shipment. Denton took with him a coal oil lantern, which he fastened to studding upon the upper side of the car, and lighted same at certain hours, when it was dark, in order to feed the stock.

The car and property were duly transported over the line of railroad of the initial carrier to St. Louis, Mo., and were there delivered to the appellants as connecting carriers, who undertook to transport same over their own line from St. Louis to Ogden. The train left St. Louis about 6 o'clock p. m. of February 12th, and arrived at a point on appellants' railroad known as Gad's Hill about 5 o'clock a. m. of February 13th, when the car containing this property was discovered to be on fire, and the property was thereby destroyed. It appears from the testimony on the part of appellees that the train was quite long, consisting of some 60 cars, and was propelled by two engines. When the train arrived at the station of Vulcan, which is variously estimated by the witnesses to be from four to eight miles distant from Gad's Hill, the train was cut in two parts and placed upon side tracks, so as to permit other trains to pass upon the main track. During the time the train remained at Vulcan, a number of passenger trains passed, going at the rate of 40 miles per hour; and some switching was also done at this place. For the purpose of ventilation, the sliding door on the east side of this car was left partly open, and trains passed it at this station on both sides of the car.

The train then proceeded toward Gad's Hill with one engine in front and the other in the rear. It appears that the grade of the railroad track at Gad's Hill was very steep, and when the train arrived there an attempt was made to go up the grade with the entire train, and to effect this the engine used a great amount of steam; but sufficient power could not be secured to make the grade. Twelve of the cars were then cut loose from the train, and by the front engine were taken up the grade, leaving the other cars standing, amongst which was the car containing the property of appellees. It was about this time that this car was discovered to be on fire.

It appears that the agent, Ed Denton, had left this car at Vulcan, and gone to the caboose in the rear of the train, in order to warm himself, leaving Rose in the car, who went to sleep. The

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testimony on the part of the appellees tended further to prove that when the train "stalled" at Gad's Hill Rose was awakened by the stock and the fire. At that time the fire had enveloped the hay, and was sending up great flames from the interior of the car, so that Rose, with singed eyebrows and hair, was only able to escape through the door in his stockinged feet. No other car appears to have caught on fire.

The testimony on the part of appellees tended also to prove that neither Denton nor Rose smoked, and that they had lighted the lantern the last time before the fire some time prior to reaching Vulcan, and that it had been extinguished before reaching that station; that the lantern was securely fastened with nails turned back into the wood, so that it could not fall, and that each time the lantern was lighted the match was thrown outside, and that the fire was not caused by the lantern or by any act done by them. And we are of the opinion that from the circumstances adduced in evidence—the manner in which the sliding door was left open, with the inflammable hay in between the doors, from the switching that was done at Vulcan, which, according to the testimony adduced by appellees, was from 20 to 30 minutes prior to the discovery of the fire, from the great amount of steam that was used, and the consequent expulsion of sparks from the locomotives at Gad's Hill just before the fire was discovered, and from the testimony of Denton and Rose that the fire was not caused by the lantern or any act on their part—the jury could have found therefrom that the fire was caused by sparks emitted from one of appellant's engines. *Railway Company v. Dodd*, 59 Ark. 317, 27 S. W. 227; *St. L., I. M. & S. R. Co. v. Coombs*, 76 Ark. 132, 88 S. W. 595; *St. L., I. M. & S. R. Co. v. Dawson*, 77 Ark. 434, 92 S. W. 27; *St. L. S. W. R. Co. v. Trotter-Minnis*, 89 Ark. 273, 116 S. W. 227.

On the other hand, the testimony on the part of the appellants tended to prove that the lantern was seen in the hands of Denton at various times from St. Louis to Bismark, which is about 42 miles distant from Gad's Hill, and that when in the car it was hung upon a pole running across the car. From these facts, and the circumstances of the fire, we think there was evidence which would have justified the jury in finding that the fire was caused by the lantern, which was in the sole use and control of appellees' agent.

At the request of the appellees, the court gave the following instructions, amongst others:

"(1) In this case the defendant is liable to the plaintiffs, respectively, for the damages sustained by them, if any, by reason of the destruction of such goods and property as you may find plaintiffs shipped from McLeansboro, Ill., in February, 1910, for which they have sued, unless you find that the defendant has

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proved by a preponderance of the evidence that said goods and property were lost or destroyed by reason of the alleged neglect of the plaintiffs, or Ed Denton, or W. H. Rose, as claimed in the defendant's answer."

"(4) The defendants have affirmatively pleaded in this cause that the fire was caused by the negligence of the agent or employee of the plaintiffs (or Rose). You are told that the burden of the proof is upon the defendants to show that defense, and, unless you find from a preponderance of the evidence that said defense has been sustained, then you cannot find that said fire was caused by said plaintiffs or their agent (or the said Rose)."

The appellants requested the court to give, amongst other instructions, the following, which was refused:

"(6) You are instructed that the defendant companies, as common carriers of plaintiff's property, alleged to have been destroyed, are not liable in damages for the destruction of said property by fire while in their possession, if said fire was caused or originated by reason of the acts or fault of the agent of the shipper accompanying said shipment, or by the act of said Rose, if you find that said Rose was riding in said car with the knowledge, acquiescence, or consent of Denton, the agent of the shipper, and with the knowledge, acquiescence, or consent of the defendant railway companies. If, therefore, you believe that the destruction of said car was due to any act of the said Rose or the said Denton, or if you find that the destruction of said car by fire may be as reasonably attributable to the acts of said Rose or the said Denton, as to the sparks emitted from the locomotives of the defendants, then it will be your duty to return a verdict for the defendant."

The jury returned a verdict in favor of appellees, and this appeal is taken by the appellants from the judgments rendered thereon.

[1] 1. In the bill of lading or contract of shipment, there was a provision limiting the liability of the carrier for the loss of the property while in transit to an amount therein stipulated. The lower court ruled that this provision of the contract was not binding, and that appellees were entitled to recover, if at all, the market value of the property destroyed, and thereupon permitted the introduction of testimony relative to the market value of each item of the property destroyed. This ruling of the court we think was correct. This was an interstate shipment, and this court has held that under the interstate commerce act (Act Feb. 14, 1887, U. S. Comp. Stat. 1901, p. 3169), with the amendments thereto, commonly known as the Hepburn act (Act June 29, 1906, U. S. Comp. Stat. Supp. 1907, p. 1909 [Supp. 1909, p. 1166]), any contract limiting the liability of a carrier of property transported in interstate commerce in case of loss to certain specified

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maximum amounts was void. *Southern Express Co. v. Meyer*, 94 Ark. 103, 125 S. W. 642; *St. L., I. M. & S. R. Co. v. Dunn*, 94 Ark. 407, 127 S. W. 464; *K. C. S. Ry. Co. v. Carl*, 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56; *St. L. S. W. R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933.

[2] 2. It is urged by counsel for appellants that the court erred in refusing to permit certain testimony as to statements made by Rose and Denton just after the fire to be considered for the purpose of showing the origin thereof. After Rose escaped from the burning car, he went to the caboose at the rear of the train, a distance of probably 48 car lengths, or 1,600 feet, and there told Denton of the fire. Denton then left the caboose, and one of the brakemen testified that he thereupon asked Rose to sit down in the caboose, and inquired of him how the car got on fire, and that Rose replied, "Don't know how it got on fire, without it got on fire from the lantern." The brakemen further testified that Denton in the meanwhile had gone to the burning car, and in a short time returned to the caboose, and thereupon Denton and Rose talked about the lantern. Denton asked Rose how the fire occurred in the car, and Rose replied, "I don't know how, unless it was from that lantern." And Denton said, "I turned the lantern out when I left." And Rose said: "No; you didn't turn it out. You turned it down low, but you didn't turn it out." And Denton said, "Yes, I did," and they disputed as to this. Upon their examination as witnesses, Rose and Denton had been asked whether these conversations had occurred, and whether they had made these statements, and both denied that such conversations had occurred, or that they had made any such statements. The court ruled that the brakeman could testify as to the conversations and statements, and that they could be considered for the purpose of contradicting these witnesses, but not for the purpose of showing the origin of the fire. Counsel for appellants urge that these conversations and statements were part of the *res gestæ*, and were therefore competent as evidence of the origin of the fire.

In the case of *L. R. T. & E. Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7, it is said that this court has repeatedly quoted with approval the following definition and explanation of "*res gestæ*" from Wharton on Evidence: "The *res gestæ* may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time, more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander; they may comprise things left undone, as well as things done. Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense: That

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they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act."

It has also been said that, in order to constitute a part of the *res gestæ*, the statements must have been made under circumstances that show that they are immediate emanations of the occurrence, and not of a mind endeavoring to excuse the happening, or with the intent to manufacture evidence for one's benefit. *K. C. S. Ry. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363.

In the case of *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106, it was held that the statements of the deceased as to how he had been hurt, made about 30 minutes after the injury and after he had been carried home, were not a part of the *res gestæ*.

In the case of *St. L., I. M. & S. R. Co. v. Kelley*, 61 Ark. 52, 31 S. W. 884, it was held that the statement made by a railroad brakeman a few minutes after a child was struck and injured by a train, after the acts to which it referred were completely passed, in response to questions as to how the injury occurred, was a narration of past events, and not part of the *res gestæ*.

In the case of *L. R. T. & E. Co. v. Nelson*, *supra*, a statement made by the motorman in charge of a street car a few minutes after an injury was complete, as to what he had done, was held inadmissible as part of the *res gestæ*. See, also, *Rogers v. State*, 88 Ark. 451, 115 S. W. 156.

While there are no limitations of time within which the *res gestæ* can be arbitrarily defined, yet to constitute them *res gestæ* the matters and declarations offered in evidence must be so closely connected with the actual occurrence as to be without the suspicion of afterthought. They must be "the event speaking through the instinctive words and acts of the participants, and not words and acts of the participants narrative of the events."

In this case it appears that the conversation had with the brakeman by Rose was in the nature of an opinion, rather than a statement of fact relative to the occurrence. It was made as a narration of a past event, as to which the participants, Denton and Rose, differed. The first statement was made after Rose had traveled the distance of 48 car lengths, and after he had informed Denton of the fire, and after Denton had left the caboose. Under these circumstances, we do not think from the time and manner in which this statement was made that it was so proximate as to grow out of the occurrence, and so closely connected with it as to constitute one transaction. The statements made in the conversation claimed to have taken place between Denton and Rose were still longer after the fire, and were seemingly made with the intent of exculpating each of the speakers, rather than as words springing from the occurrence itself. We do not think that any of these statements was part of the *res gestæ*.

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[3] 3. It is urged by counsel for appellants that the court erred in its rulings upon the above-quoted instructions, and by them in effect holding that the burden of proof was upon the carrier to show that the loss occurred by reason of the act of the shipper or his agent, even though the shipper or his agent accompanied the goods. It is familiar doctrine that the law imposes upon a common carrier an unusual and extraordinary duty and liability for the safety of the goods intrusted to it for the purpose of transportation. The bill of lading which it issues is not only an acknowledgment of the receipt of the goods for carriage, but it is also a contract to carry safely and deliver. It is, however, the duty of the common carrier, irrespective of any contract, subject only to reasonable regulations, to accept and safely carry and deliver the goods which are intrusted to it for transportation. Its obligation and liability does not rest alone upon contract, but upon its duty as a common carrier, fixed and settled by custom and common law. By the common law, the carrier is made practically an insurer of the goods against all losses of every kind, with certain exceptions. These exceptions relate to losses which arise from certain specified acts and these acts are the act of God, of the public enemy, of public authority, of the shipper, or from the inherent nature of the goods. In all cases in which the loss occurs, except in cases where it arises from one of the above-specified acts, the carrier is responsible, although there may be no negligence or fault upon its part. Its liability springs from the duty imposed upon it to carry safely, and the law making it responsible as an insurer for the losses occurring from any and every cause other than one of the above-specified excepted acts. 1 Hutchinson on Carriers, § 265; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; L. R., M. R. & T. Ry. Co. v. Talbot, 47 Ark. 97, 14 S. W. 471; Merritt v. Earle, 31 Barb. (N. Y.) 38; Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515.

It has also been held that a common carrier may by reasonable contract limit the liability which is thus imposed upon it by the common law. But those contractual limitations have been virtually abrogated by national and state legislation. Inasmuch as the law makes the obligation of the carrier in the nature of an insurer of the safety of the goods intrusted to it for carriage, it is settled that whenever the carrier claims that the loss arose from one of the above-specified acts, exempting it from liability, the burden of proof of that fact rests upon the carrier. 2 Hutchinson on Carriers, § 287; 3 Hutchinson on Carriers, § 1353; Mitchell v. Carolina Cent. Rd. Co., supra; Bonfiglio v. Lake Shore, etc., R. Co., 125 Mich. 476, 84 N. W. 722; Park v. Preston, 108 N. Y. 434, 15 N. E. 705; Wallingford v. Railroad Co., 26 S. C. 258, 2 S. E. 19; Davis v. Wabash, St. L. & P. T. Co., 89 Mo. 340, 1 S. W. 327; Schaeffer v. Phila. & Reading R. Co., 168 Pa. 209,

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31 Atl. 1088, 47 Am. St. Rep. 884; Kalina v. Union Pac. R. Co., 69 Kan. 172, 76 Pac. 438.

In a suit brought by a shipper for loss of his goods, therefore, it is ordinarily sufficient to show a delivery of the goods to the carrier for transportation, and a subsequent loss thereof during transit. The onus probandi is then upon the carrier to bring the case within one or the other of the said exemptions. If the carrier claims that the loss arose from the act of the shipper, with or without negligence, the burden of proof rests upon the carrier to show that fact. If it proves that the loss occurred from an act of the shipper, whether negligent or otherwise, then the carrier is relieved from liability, unless it is shown by the shipper that, notwithstanding his own act caused the loss, the damage was due to some subsequent negligence of the carrier in avoiding or minimizing the damage. In that event, the burden rests upon the shipper to show such negligence upon the part of the carrier.

In the case of *Cau v. T. & P. R. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, it is said: "After the damage to the goods has been established, the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that, even if the damage so occurred, yet, if it might have been avoided by skill and diligence at the time, the carrier was liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish negligence, as the affirmative lies upon him." *Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41; *Arthur v. T. & P. R. Co.*, 204 U. S. 505, 27 Sup. Ct. 338, 51 L. Ed. 590; *St. L., I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *L. R., M. R. & T. R. Co. v. Talbot*, 39 Ark. 523.

The fact that the shipper or his agent accompanies the goods does not alter this rule that the burden of proof rests upon the carrier to first show that the loss was due to the shipper, if it claims exemption upon that ground. It is true that the goods are then not in the exclusive possession of the carrier, but they are in its custody, although the shipper also exercises acts of supervision over them. The carrier still continues under its common-law obligation of an insurer; and it is only relieved from liability when it shows that the loss occurred from an act exempting it from liability under the common law, or a special valid contract.

It is argued that the shipper who accompanies the goods has facilities equal to those of the carrier for knowing and explaining the cause of the loss occurring during transit, and that the burden is for this reason cast upon him to show the cause thereof. This contention can only be predicated upon the theory that the carrier is only liable for its negligence, and that the burden of showing that it was free from negligence is cast upon it because, while the goods are in its exclusive custody, it has facilities of showing that

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the loss did not occur from its negligence. But the carrier is liable, not because of its negligence, but because of specific law, which makes it the insurer of the goods while in transit, whether the cause of the loss arose from its negligence or not. Its liability, not being dependent upon its negligence, or its exemption from liability upon its freedom from negligence, the fact that it has or has not better facilities for showing that the loss occurred without negligence on its part cannot affect its liability. Its liability as an insurer of the property is not altered or lessened because the shipper accompanies the goods, and therefore because the carrier has not the exclusive possession thereof. In order to be relieved from liability, the carrier must by proof bring itself within the exception which exempts it from the liability which is imposed upon it by positive law, and the burden cannot be shifted to the shipper to show that it does not come within that exception.

We do not think that this holding is in conflict with any principle announced in the case of *St. L., I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104. In that case there was a special contract, which at that time was valid, relieving the carrier from all liability for loss occurring to stock from any cause, other than its own negligence. By that special contract, the carrier limited its liability as an insurer, and made itself liable only in event of its own negligence. It was held in that case that the presumption of negligence against the carrier from loss occurring while the stock was in transit ordinarily arose from the fact that it was in the exclusive possession of all the means of explaining the cause of the loss. But the court goes on to say in that case: "In this case there was a restriction upon the common-law liability of the carrier." It therefore held that by reason of said special contract limiting its liability as an insurer the carrier was only liable in event of proof of its negligence, and that, under such valid contract, when the owner accompanied the property he had equal means with the carrier of explaining the cause of the loss; and the burden was, under such circumstances, upon the shipper to show the negligence on the part of the carrier.

That the decision in the *Weakly Case* is based upon the special contract limiting the liability of the carrier as an insurer which was entered into in that case, will be seen from the case of *St. L. & S. F. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534. In the latter case complaint was made of the following instruction, given at the instance of the shipper: "If the jury find that the defendant received the jack for shipment, and the same was killed while in the defendant's car, the presumption is that such killing resulted from the negligence of the defendant, or its servants, in the operation of its locomotive or cars." Reliance was placed upon the *Weakly Case* to show that this instruction was erroneous. After showing that the contract therein pleaded was not legally entered

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into, and that the decision in the *Weakly* Case was predicated upon a contract of similar import, which had been legally entered into, the court said: "But, with the special contract out of consideration, the carrier was liable as an insurer of the safe transportation and delivery of the freight; it was responsible for all losses, except those occasioned by the act of God or the public enemy; and when it appeared that the animal was killed while in transit it devolved upon the carrier, in order to exonerate itself from liability, to show that the loss resulted from one of those causes."

We have been referred by counsel for appellant to several cases upon this question, but in none of them is it held that the carrier is relieved of the burden of showing that the loss of the goods while in its custody in transit arose from the act of the shipper or his agent, when that exemption was relied upon, even where the shipper or his agent accompanied the goods. In those cases to which we have been referred, it was only held, either that the court erred in refusing to instruct the jury that, "if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant who was in the car in charge of the property, plaintiff could not recover," as in the case of *Hart v. C. & N. W. R. Co.*, 69 Iowa, 485, 29 N. W. 597, or that the undisputed evidence showed that the loss occurred through the act of the shipper or his agent accompanying the goods, as in the case of *Nunnelee v. St. L., I. M. & S. R. Co.*, 145 Mo. App. 17, 129 S. W. 762.

Our conclusion is that by the common law a common carrier is in effect an insurer of goods intrusted to it for carriage while the same are in transit, except when the loss occurs by reason of one or the other of the acts above specified, and that the burden of proving that the loss arose from any of those excepted acts rests upon the carrier, even though the shipper accompanies the goods; and that it is only in cases where the shipper claims that the carrier was negligent in not avoiding or lessening the damage after it had arisen from an act of the shipper that the burden of proof rests upon the shipper to prove such negligence.

[4] Upon the trial of this case, both parties, it appears, proceeded upon the theory that if the loss was caused by the act of the agent of appellees or of Rose in the use of the lantern—that is to say, if the fire originated from the lantern—then such act was indisputably one of negligence. The appellants, as well as appellees, requested instructions based upon that theory, and did not specifically or in effect otherwise object to the use of the word "negligent" in appellees' instructions, as applied to the act of Denton or Rose. They thereby waived any objection thereto on that ground. *Choctaw, O. & G. R. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839; *St. L. & S. F. R. Co. v. Vaughan*, 88 Ark. 138, 113 S. W.

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1035; Little Rock & M. Ry. Co. v. Russell, 88 Ark. 172, 113 S. W. 1021; Ark. Midland Ry. Co. v. Rambo, 90 Ark. 108, 117 S. W. 784. In the light of the manner in which the case was tried, both parties and the jury understood that these instructions in effect stated that the burden of proof rested upon the appellants to show that the loss occurred from an act of the shipper or his agent, whether such act was negligent or not, and that if the loss did arise from the act of the shipper or his agent Denton, or of Rose, whether negligent or not negligent, then appellants were not liable for the loss. We are therefore of the opinion that the court did not err in its rulings upon the instructions.

We have examined the other assignments of error made by appellants, and we do not think that any of them are well founded. Finding no prejudicial error in the trial of the case, the judgment is affirmed.

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(Supreme Court of North Carolina, Nov. 22, 1911.)

[72 S. E. Rep. 1042.]

Carriers—Live Stock—Liability.—Carriers of live stock receive and hold the same as common carriers.

Carriers—Live Stock—Liability.—Carriers of live stock do not insure against injuries arising from the natural vices and propensities of the animals.

Carriers—Live Stock—Duty of Carriers.—A carrier of live stock must provide suitable and adequate cars for the care and preservation of the stock during transportation, and must afford proper facilities for having them watered and attended to, and make proper provision for them respecting peculiar traits or conditions of which it has notice, and especially when the carrier makes stipulations in regard to such conditions.

Carriers—Live Stock—Action for Injury—Negligence—Evidence—Sufficiency.—Evidence, in an action against a railroad company for injury to live stock, held to warrant a finding of negligence.

Carriers—Live Stock—Limitation of Liability—Validity.*—Stipulation in a live stock shipment contract, limiting the carrier's liability for negligence to an inadequate valuation, without good faith intent

*See second foot-note of Union Pac. R. Co. v. Stupeck (Colo.), 40 R. R. R. 748, 63 Am. & Eng. R. Cas., N. S., 748; last foot-note of Gardiner v. New York Cent., etc., Co. (N. Y.), 40 R. R. R. 765, 63 Am. & Eng. R. Cas., N. S., 765; last head-note of Louisville & N. R. Co. v. Smith (Tenn.), 40 R. R. R. 291, 63 Am. & Eng. R. Cas., N. S., 291; second head-note of Pierson v. Northern Pac. Ry. Co. (Wash.), 39 R. R. R. 303, 62 Am. & Eng. R. Cas., N. S., 303.

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to arrive at the actual value, is unenforceable, though the classification and rate made in the bill of lading has been approved by the Interstate Commerce Commission.

Evidence—Presumptions—Laws of Other States.—In the absence of evidence to the contrary, a doctrine, derived from the common law, prevailing in the state is presumed to obtain in a sister state.

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by George M. Harden against the Chesapeake & Ohio Railway Company and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Civil action to recover for damages to live stock, shipped by plaintiff over the lines of defendant companies. On the trial, it appeared that plaintiffs, having purchased a number of standard bred horses, in February, 1910, shipped same over lines of defendant companies from Lexington, Ky., over the Chesapeake & Ohio Road, to Lynchburg, Va., and from that point over the Southern to Greensboro, N. C. There was evidence, on the part of plaintiff, tending to show that plaintiff, during the negotiations for shipment, informed the agent of the Chesapeake & Ohio Road that the horses were a highpriced lot, and that one was a stallion, about three years old; that the natural propensities of a stallion of that age, and of this one, were such that it was dangerous to turn him in with the other stock, and that defendant (the Chesapeake & Ohio Road), on being informed that such an animal was in the lot, undertook and agreed to have him securely boxed off from the others; that this was done in such a negligent manner that when the car reached Lynchburg this partition or stall was entirely down, allowing all the stock to mingle together. The agent of the Chesapeake & Ohio, describing the manner in which it had been first constructed, spoke of it as a "sorry job," and, owing to this fact and the condition of the car, the Southern Railroad refused to receive the stock at Lynchburg until the car was repaired and the conditions corrected; that this was done by the agent of the Chesapeake & Ohio, and the stall securely built, but, in replacing the horses in the car, said agent put in the box stall one of them which had already been hurt, and turned the stallion in with the others, and with the result that, when the stock arrived at Greensboro, they were bitten and kicked until one of them died of his injuries, and others badly damaged to the amount of \$1,160; that of this damage \$450 was done to the horses of another shipper, and the damage done to plaintiff's horses, attributable to defendant's negligence, amounted to \$710. There was allegation with evidence on part of defendant, tending to show that defendant, the Chesapeake & Ohio Railroad, had only made a rate as far as Lynchburg, the shipment from that point being over the lines of the Southern Rail-

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way; that the defendant, the Chesapeake & Ohio Railroad, had not undertaken to box off the stallion, and was guilty of no negligence in that respect. Defendant further introduced and relied upon the written contract of shipment, or bill of lading, in which it was stipulated, in effect, and as relevant to the inquiry, that, in consideration of a reduced freight rate, the Chesapeake & Ohio Railroad was only to be chargeable for injuries arising from its gross negligence, and, on the question of value, that in case of any injuries to the stock, for which said company was responsible, under the contract, the amount of recovery should in no case exceed \$75 for each horse, mule, stallion, or jack, \$30 for each cow, steer, or bull, and \$5 for each other animal; and the agent testified that this was an old printed form, and the value (\$75) having been changed to \$100 by subsequent regulations of the company, he inserted the \$100 in lieu of the \$75, and that by this classification and rating the plaintiff saved several hundred dollars in freight charges. There was testimony, also, for defendant that the classification and freight rate in this instance was in accord with a regulation made and approved by the Interstate Commerce Commission. The judge charged the jury, and on issues submitted they rendered the following verdict:

"(1) Was the plaintiff's property injured by the negligence of the defendant, the Southern Railway Company as alleged in the complaint? Answer: No.

"(2) Was the plaintiff's property injured by the negligence of the defendant, the Chesapeake & Ohio Railway Company, as alleged in the complaint? Answer: Yes.

"(3) What damages is plaintiff entitled to recover from the Southern Railway Company? Answer: None.

"(4) What damages is plaintiff entitled to recover from the Chesapeake & Ohio Railway Company? Answer: \$710."

Judgment on verdict for plaintiff, and defendant Chesapeake & Ohio Railroad excepted and appealed.

Aycock & Winston, for appellant.

Armistead, Jones & Son, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] It is very generally held that railroad companies receiving live stock for shipment take and hold them as common carriers, and, as a rule, are chargeable with the duties of such carriers concerning them. There is a recognized limitation on the obligations of common carriers, in reference to live stock, to the effect that they are not considered as insurers of such property against injuries arising from the natural or proper vices or the inherent nature and propensities of the animals themselves, or from the "vitality of the freight," as it is sometimes expressed, unless the injuries from such source are attributable, in whole or in part, to the carrier's

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negligence. The general principle, with its recognized modifications, is very well stated in Moore on Carriers, p. 486, as follows: "Carriers of live stock are common carriers, subject to all the duties, responsibilities, and liabilities, and entitled to all the rights and privileges, of a common carrier of merchandise or other inanimate property, save in one important respect. While common carriers are insurers of inanimate property against all loss and damage, except such as is inevitable or attributable to the act of God, or caused by public enemies, and except that they are not held liable for losses which result from the inherent and intrinsic qualities of the goods carried by them, as carriers of live stock, they are not insurers of animals against injuries arising from or attributable to the natural or proper vices, or the inherent nature, propensities, and habits, of the animals themselves, and which could not be prevented by foresight, vigilance, and care;" and in Hale on Bailments and Carriers, it is said: "Carriers of live stock are common carriers wherever 'carriers of other goods would be; but they are not liable, in the absence of negligence, for such injuries as occur in consequence of the vitality of the freight," and these statements will be found to accord with the great weight of authority. *Selby v. Railroad Co.*, 113 N. C. 592, 18 S. E. 88, 37 Am. St. Rep. 635; *Covington Stock Goods v. Keith*, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73; *McCune v. Railroad Co.*, 52 Iowa, 600, 3 N. W. 615; *Clark v. Railroad Co.*, 14 N. Y. 570, 67 Am. Dec. 205; Elliott on Railroads, § 1548; Hutchinson on Carriers (3d Ed.) § 339.

[3] Accordingly, carriers, in the proper performance of their duties, are required to provide suitable and adequate cars for the care and preservation of live stock during their carriage, and to afford proper facilities for having them watered and attended to, and to make proper provision for them in reference to peculiar traits or conditions of which they have notice, and especially when the carrier makes stipulations in reference to such conditions. *Kinnick Bros. v. Railroad Co.*, 69 Iowa, 665, 29 N. W. 772; *Haynes v. Railroad Co.*, 54 Mo. App. 582; *Sturgeon v. Railroad Co.*, 65 Mo. 569; *Indianapolis & C. R. R. v. Allen*, 31 Ind. 394; *Smith v. New Haven, etc., Railroad*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Shaw v. Great Southern R. R. Co.*, L. R. 1, vol. 8, p. 10 (1881-82); Hutchinson on Carriers (3d Ed.) §§ 342, 343, and 636; Moore on Carriers, p. 498, § 3.

[4, 5] There was ample evidence on part of plaintiff tending to establish a breach of duty on the part of the Chesapeake & Ohio Railroad Company, and justifying the verdict that the stock was injured by the negligence of said company. The agent of that road, testifying for defendant in reference to the original construction of the stall, said it was "a sorry job," and when he had caused it to be rebuilt at Lynchburg, he put the wrong horse into

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it, and turned the stallion in with the other horses. This being true, it is well established with us that "a common carrier, in its contract of shipment, cannot stipulate against recovery for loss or damage occasioned by its own negligence, and it can make no such stipulation against total or partial loss." *Stringfield v. Railroad Co.*, 152 N. C. 128, 67 S. E. 333, citing *McConnell v. Railroad Co.*, 144 N. C. 90, 56 S. E. 559; *Everett v. Railroad Co.*, 138 N. C. 71, 50 S. E. 557, 1 L. R. A. (N. S.) 985; *Capehart v. Railroad Co.*, 81 N. C. 438, 31 Am. Rep. 505; *Parker v. Railroad Co.*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827; *Calderon v. Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033; *Railway v. Solan*, 169 U. S. 135, 18 Sup. Ct. 289, 42 L. Ed. 688; *Railway v. Lockwood*, 84 U. S. 357, 21 L. Ed. 627; *Moulton v. Railway*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781, and numerous other decisions.

There are cases which hold that the act of defendant, in turning the stallion in with the other stock, would be an act of gross negligence, and so expressly within the terms of the agreement, but, without reference to this aspect of the evidence, under the doctrine as it prevails in this jurisdiction, this stipulation is entirely void as against public policy, or in any event can only operate to relieve them from liability as insurers, which is perhaps the correct interpretation of the words. And on the facts in evidence this same principle, which avoids stipulations against recovery for negligence on the part of the carrier, should obtain in reference to the clause in the bill of lading, restricting the amount, where the recovery is had on that ground. Speaking of this question in *Everett's Case*, the court said: "It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and, at the same time permit and uphold a partial limitation which could avail to prevent anything like adequate or substantial recovery by the shipper."

In the present case it appears that this was a high-priced lot of horses, and the agent of the initial carrier was informed of this fact; that the value was inserted by the agent in a printed formula according to a predetermined, inadequate valuation, and that there was no intent or effort to fix upon the true value of the shipment, or to approximate it under any conditions sanctioned or permitted by the law; and it further appears by the uncontradicted testimony that the fair average value of the stock was between two or three hundred dollars per head.

In the *Stringfield Case*, *supra*, on facts very similar, the court held that a restrictive stipulation of this kind, as to recoveries for negligence on the part of carriers, was in contravention of public policy, and void. The ruling in *Stringfield's Case* and others of like purport was not made to depend upon whether there was one

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or more horses in the shipment (a view presented on the argument here), but on the position that there had been no bona fide effort to arrive at the true value of the shipment, or to approximate it, and to allow an arbitrary, predetermined valuation to stand, far below the actual value, would in actions of that character be in effect to uphold a stipulation against recovery for negligence—a stipulation, as stated, forbidden by our law. In Stringfield's Case, attention was called to the fact that the principle we are discussing, "when properly understood and applied, did not prevent the parties from agreeing upon the valuation of a given shipment which should form the basis of adjustment in case of loss or damage; and where this was done in the bona fide effort to fix upon the true value, and was made the basis of a fair and reasonable shipping rate, the parties would be held to the agreed valuation, though the loss should occur by reason of the carrier's negligence." And it was said, too, that an agreed valuation might be in rare instances allowed to stand for the purpose indicated, where it appeared that the agent of the carrier, being without knowledge or notice of the true value of the property, and without opportunity to inform himself, so as to make intelligent estimate concerning it, the parties, in the bona fide effort to put a correct valuation upon it, fixed upon a fair average value of property of the kind constituting the proposed shipment, and made the same, as stated, the basis of a fair and reasonable shipping rate—an instance afforded in the case of *Jones v. Railroad Co.*, 148 N. C. 581, 62 S. E. 701. Such an agreement, and a valuation so established, may not be allowed to prevail, simply because the minds of the parties have met and agreed upon the amount, but in action for injuries, caused by negligence of the carrier, it must have been agreed upon in the bona fide effort to fix upon a true valuation of the stock; and as an aid to the correct solution it may at times be well to submit an issue as to the true value or the average valuation of the property of the kind constituting the shipment, where such a view of the question is permissible.

There is no allegation or evidence of any fraud or concealment as to value on the part of the shipper, a principle sometimes present in such cases; nor can the doctrine of estoppel be invoked for defendant's relief on the facts presented in the testimony. The plaintiff, on this question, testified that he simply asked for the shipping rate, and it was given him without more. The agent of defendant testified that all that was said on the subject was that he asked if the horses were to be shipped at the usual valuation, and, on being answered, "Yes," he wrote that valuation in the bill of lading. And further as follows: "Q. Did he say anything about the value of the horses? A. No; I do not recall that he did. I asked him the question if they were to be shipped at that valuation, and he said, 'Yes.' Q. He did not say anything

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about the value himself? A. No. Q. He did not suggest it to you? A. No. Q. He did not read the contract? It was all done in about two minutes? A. Yes; it would take a long time to read it. Q. You did not read it to him? A. No. Q. He said nothing as to the value of the horses? A. He only answered my question, when I asked if they were to be shipped on the \$100 valuation. He answered my question."

Speaking to this subject in *Springfield's Case*, the court said: "Nor do we think that the doctrine of estoppel, as applied in many of the cases relied upon, should avail defendant here. Some of these decisions could be reconciled, on the ground that if the disproportion between the actual and the stipulated values is so great as to give clear indication that there was no effort made to fix upon or approximate the true value, as in this case, it could be properly held that such a contract would be neither fair nor reasonable; but in many of them we think the doctrine of estoppel is too broadly stated; for, if a contract like the one we are considering is such as to deny substantial recovery for loss occasioned by the carrier's negligence, it is void, as against public policy, and it is not permissible to uphold such an agreement on the principle of estoppel. Such a position, carried to its logical conclusion, would enable individuals, as to their personal contracts and conduct towards each other, to set at naught both the public statutes and police regulations of the state. Accordingly, we find that, except in cases of positive fraud, which, in whole or in part, may operate to set aside the contract relation, the doctrine of estoppel, as ordinarily applied, is only available in aid or extension of valid contracts. *Bigelow on Estoppel* (5th Ed.), citing *Brightman v. Hicks*, 108 Mass. 246; *Langan v. Sankey*, 55 Iowa, 52 [7 N. W. 393]; *Shorman v. Eakin*, 47 Ark. 351 [1 S. W. 559]; *Klenk v. Knable*, 37 Ark. 304—authorities which fully support the text."

It was further insisted that the recovery should not be sustained, because the classification and rate made in the bill of lading had the sanction and approval of the Interstate Commerce Commission. We have not the ruling of the Commission before us, but, in our opinion, it cannot for a moment be sustained that a ruling of the Commission, designed and intended simply as a regulation establishing a reasonable and proper freight rate without more, should have the effect of altering a principle of public policy long prevailing in the state, as said in *Everett's Case*, *supra*—a principle established and adhered to for grave and weighty reasons, and considered necessary for the protection of the great body of shippers. Replying to a suggestion somewhat similar, the court, in *Kissenger v. Fitzgerald*, 152 N. C. 252, 67 S. E. 590, said: "It is the settled policy of this state that common carriers may not contract against loss or damage occasioned by their negligence; and it has been held by the Supreme Court of

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the United States that, unless and until there is some valid regulation by Congress of the Interstate Commerce Commission directly affecting the matter, a state has the right to establish such a policy and enforce it in reference to interstate shipments. *Pa. Ry. v. Hughes*, 191 U. S. 477 [24 Sup. Ct. 132, 48 L. Ed. 268].”

[6] We are not inadvertent to the fact that the contract of shipment was made in Kentucky, and there is no evidence before us to the rules prevailing in that state concerning it. The doctrine referred to, and which we hold to be controlling on the facts presented, was established and has come down to us from the principles and policy of the common law in reference to public carriers, and the same is presumed to obtain in a sister state, in the absence of evidence to the contrary. *Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 24. On investigation, however, it seems that like doctrine prevails in full force in the state of Kentucky, and has been made a part of the organic law of that state. *Lewis v. Louisville & Nashville R. R.*, 135 Ky. 362, 122 S. W. 184, 25 L. R. A. (N. S.) 938. On the whole matter, we find no reversible error in the record, and the judgment in plaintiff's favor is affirmed.

No error.

HOTENBRINK v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk, Feb. 28, 1912.)

[97 N. E. Rep. 624.]

Carriers—Injuries to Passengers—Negligence.—The momentary presence of tobacco spit on a car step does not render the carrier liable for injuries to a passenger slipping on the step while alighting, and in the absence of evidence justifying an inference that the slippery condition had existed for a considerable period of time there can be no recovery.

Carriers—Injuries to Passengers—Negligence—Evidence.—A conductor of an elevated railway company, not required by the rules of the company to examine car steps for tobacco spit, and occupying such a position on the rear platform as enabled him to see only the outer edge of the step, is not guilty of negligence in failing to see tobacco spit on the car step.

Exceptions from Superior Court, Suffolk County; J. F. Quinn, Judge.

Action by Eva Hotenbrink against the Boston Elevated Railway Company for injuries sustained by falling from the step of a car while alighting therefrom. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

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W. P. Murray and *E. F. Hodgdon*, for plaintiff.

Sheldon E. Wardwell, for defendant.

DE COURCY, J. There was evidence for the jury of the plaintiff's due care, and we do not understand that the defendant contends to the contrary. The sole question here is that of the defendant's negligence, involved in the presence of some tobacco spit of the size of a silver dollar or half dollar on the rear step of the car.

Even if it be assumed that the presence of tobacco spit would produce a slippery condition on the car step, the plaintiff was bound to show that the defendant's conductor knew it was there, or by the exercise of the care owed to the plaintiff would have seen and removed it.

[1] There is no evidence that the conductor knew the saliva was there. No witness in the case, with the exception of the plaintiff and the child Clausina Bookhaut, testified that the alleged condition existed even at the time of the accident; and no witness testified to its existence before the plaintiff alighted. The momentary presence of such a substance on the step would not render the defendant liable. *Goddard v. Boston & Maine Railroad*, 179 Mass. 52, 60 N. E. 486; *Lyons v. Boston Elevated Railway*, 204 Mass. 227, 90 N. E. 419. There was nothing in its appearance from which the inference could be drawn that it had been upon the step for a considerable period of time. *Anjou v. Boston Elevated Railway*, 208 Mass. 273, 94 N. E. 386. The inference that it must have been there for two minutes, or since the preceding stop at H or I street, is merely conjectural, for it might have come from some passing teamster or pedestrian or otherwise.

[2] And the evidence fails to show that the conductor was negligent in failing to see this substance on the step before the plaintiff fell. His position on the rear platform, to the left of the controller, would enable him to see only the outer edge of the step. It was not something to be anticipated like the accumulation of mud and slime on rainy days (*Kingston v. Boston Elevated Railway*, 207 Mass. 457, 93 N. E. 573), or of snow and ice during our winter season (*Foster v. Old Colony Street Railway*, 182 Mass. 378, 65 N. E. 795). Nor did the testimony disclose any rule of the company imposing upon the conductor a special duty to examine the car steps for tobacco spit. *Kingston v. Boston Elevated Railway*, 207 Mass. 457, 93 N. E. 573.

On the evidence presented the plaintiff was not entitled to go to the jury on the issue of the defendant's negligence.

Exceptions overruled.

ST. LOUIS & S. F. R. CO. *v.* YOUNT.

(Supreme Court of Oklahoma, Nov. 18, 1911.)

[120 Pac. Rep. 627.]

Action—Form of Actions—Abolition.—The common-law rules of pleading and all distinctions in form required thereunder, and all distinctions between actions at law and suits in equity, are abolished by the statutes of Oklahoma, leaving but one form—a civil action—which consists in a statement, in a proper court, of the facts, showing, in plain, ordinary, and concise language, the injury complained of, the redress to which the plaintiff is entitled, the party liable therefor, and concluding with a prayer for the relief sought.

Carriers—Expulsion of Passenger—Damages—Nature of Action.*—In an action for damages for wrongful expulsion of a passenger from a train, where the plaintiff in his petition has placed himself clearly within the rules of procedure (chapter 87, Snyder's Comp. Laws of Okla.; chapter 66, S. 1893), he cannot be precluded from recovery for humiliation and wounded feelings because of a doubt as to whether his suit was an action *ex contractu* or *ex delicto*.

Carriers—Expulsion of Passenger—Damages—Humiliation.*—In an action for damages from being wrongfully expelled from a passenger train, where the passenger is without fault, and where recovery is warranted by the evidence, he may recover a reasonable amount for insult, injured feelings, and humiliation, in connection with the actual expense incurred by the delay, although the conductor who ejected him used no force or violence, and was without fault in the premises.

(Syllabus by the Court.)

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by Paul Yount against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was begun in the district court of Comanche county on September 28, 1907, by Paul Yount against the St. Louis & San Francisco Railroad Company for damages in the sum of \$1,041.98, by reason of being ejected from a passenger train on said railroad; and thereafter, on September 25, 1908, in a jury

*See foot-note of *St. Louis, etc., Ry. Co. (Ark.)*, 40 R. R. R. 736, 63 Am. & Eng. R. Cas., N. S., 736; last foot-note of *St. Louis Southwestern Ry. Co. v. Hammett (Ark.)*, 40 R. R. R. 702, 63 Am. & Eng. R. Cas., N. S., 702; foot-note of *Brenner v. Joneboro, etc., Ry. Co. (Ark.)*, 26 R. R. R. 229, 49 Am. & Eng. R. Cas., N. S., 229.

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trial, he recovered judgment in the sum of \$500, from which judgment the defendant company appeals.

The petition in error contains the following assignments: First. The verdict of the jury is not sustained by sufficient evidence, and is contrary to law. Second. The court erred in his instructions given to the jury. Third. The court erred in refusing to give instructions numbered 1 to 4, and each of them, requested by plaintiff in error. Fourth. Error in the assessment of the amount of recovery; the same being too large. Fifth. Errors of law occurring at the trial, and duly excepted to by plaintiff in error at the time. Sixth. The court erred in overruling the motion of plaintiff in error for a new trial.

The evidence discloses that on July 2, 1907, Paul Yount and his brother Isom (Pete) Yount each purchased round trip tickets from Lawton, Okla., to St. Louis, Mo., from the defendant company's agent at Lawton; the tickets costing \$27.85, each, to be good until October 28, 1907. The plaintiff below, in company with his brother Pete, took the train at Lawton on the day the tickets were purchased, and from there went to St. Louis. On their going trip, plaintiff's ticket was punched by the conductors on the different divisions along the road. The plaintiff had been instructed by the agent at Lawton to go to the agent at St. Louis and have his ticket validated before he took the train for the return trip; the plaintiff having, after he reached St. Louis on the going trip, visited his relatives in Indiana, traveling over a different road, and not using the same ticket. On his return from Indiana to St. Louis, he went to the agent at St. Louis, and had his ticket validated, as per instructions and according to the company's rules preparatory for his return from St. Louis to Lawton. This was about July 17th. After the train pulled out of St. Louis, and before reaching the next station, the conductor came around to take up the tickets. He took plaintiff's ticket first—that is, before looking at his brother's ticket—and informed plaintiff that it was "no good," and remarked, "On the bum;" whereupon Pete Yount, his brother, told the conductor that his was just like his brother's, and that they got them the same time. The conductor then took Pete's ticket, accepted it as good, and punched it. Pete called the conductor's attention to some figures on the back, which figures had been made by the agent at Lawton, and asked the conductor to wire to the agent at Lawton and ask him if he and his brother had not bought tickets there. This the conductor refused to do. He told the plaintiff that he would have to get off at the next station or pay his fare, giving no further explanation, nor making any further remark than, "On the bum." It is not shown clearly whether this remark was meant for the ticket or passenger.

The next station was the town of Pacific, Mo., and just before

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reaching the station the conductor came through, put his hand on plaintiff's shoulder, and informed him that he would have to get off at this station, or pay his fare. The conductor gave no explanation to plaintiff of his conduct, or why he refused the ticket, or wherein the ticket showed to be not good, but simply informed him that he would have to get off the train, or pay his fare. The plaintiff did not have money enough to pay for another ticket from there to Lawton; nor did he and his brother both have sufficient money to buy another ticket.

The conductor remained with him, or close to him, until the train stopped at the depot in the town of Pacific. It being suggested to plaintiff by his brother that he had better get off than have a fight, plaintiff got off on the platform; the conductor and his brother following out on the platform; his brother telling plaintiff to remain there at Pacific until he reached Lawton, and he would have the agent wire transportation back. Plaintiff remained at this place about three days before he received transportation from his brother at Lawton. In the meantime he had done some little work shoveling coal at a mill. While he remained at Pacific, he was out in cash something like \$4, and the ticket from Pacific to Lawton cost him \$17.98. In addition to this outlay, he claimed, in his petition and in his testimony, to have been damaged in the sum of \$7 to \$10 per day while detained at Pacific in loss of time, and to have been damaged in the sum of \$1,000 from humiliation, mental suffering, and disgrace from being ejected from the train in the presence of other passengers. The fact also appears that the conductor did not assault him, or make any threats of assault, used no violence, nor showed any malice, but simply informed him that he would have to get off the train, or pay his fare. It further appeared that there were some marks or punches on the ticket which appeared to the conductor in question to have been made by some other conductor over the same division; this being the reason assigned by the conductor in his testimony for not accepting the ticket. These are the material facts, and about all the material facts in the case.

W. F. Evans, E. T. Miller, and R. A. Kleinschmidt, for plaintiff in error.

Fred R. Ellis, for defendant in error.

HARRISON, C. (after stating the facts as above). To go at once into an analysis of the propositions involved herein, the argument of counsel for plaintiff in error resolves itself into this position: That this is an action *ex contractu* and not *ex delicto*; but if treated as an action in tort, then the verdict is not supported by the evidence, and if as an action on contract, then the measure of damages is the actual expense incurred for board,

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lodging, and loss of time occasioned by the delay and the cost of another ticket. Therefore let us first determine the form of action, then determine whether or not the verdict is excessive.

[1] To determine the form of the action, we will look to the statutes, as aided by the common law, and as construed by the courts. To determine whether the verdict is excessive, we will look to the decisions of the courts, as applied to similar conditions of fact. As to the first proposition, Snyder's Comp. Laws of Okla. § 5534: "The common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma, but all such statutes shall be liberally construed, to promote their object." S. 1893, § 3874.

Section 5542: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing are abolished; and in their place shall be, hereafter, but one form of action, which shall be called a civil action." S. 1890, § 3882.

Section 5625: "The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." S. 1893, § 3963.

Section 5626: "The only pleadings allowed are: First, the petition of plaintiff. Second, the answer or demurrer by the defendant. Third, the demurrer or reply by the plaintiff. Fourth, the demurrer by the defendant to the reply of the plaintiff." S. 1893, § 3964.

The object of the Legislature in enacting these statutes was not only to abolish distinctions between actions at law and suits in equity, but also to relieve litigants of the intricacies and technical distinctions involved in common-law rules of pleading, and to provide a plainer, simpler, more speedy, and less cumbersome system of procedure, by which their rights might be determined. Thus the abolition of all former distinctions in pleading and forms of action leaves but the one form—a civil action—which consists in a statement, in a proper court, in plain, ordinary, and concise language, of the facts, showing the injury complained of, the redress to which the litigant is entitled, the party liable therefor, and concluding with a prayer for the relief sought.

[2] These statutory requisites being complied with, the litigant has placed himself within the cognizance of the court, and his rights are to be determined, under the law, from the facts, conditions, and circumstances involved. In determining the rights of

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parties from a given state of facts, however, the courts quite frequently seek light from the decisions under the common law; in fact, it often becomes necessary to resort to distinctions made under the common law for light on a given proposition. Not so much, however, in recognition of the present existence of these distinctions, nor of the necessity of maintaining such distinctions under the Code, but to be aided thereby in a proper adjudication of the rights of parties to a given state of facts. The rights of parties under our statutes are not determined by the form of the action, but from the facts in the case, as governed by statute, aided by the decisions under similar circumstances. These rules of statutes are mandatory with the courts and redressive to litigants; and where a party to an action has brought himself clearly within them he cannot be denied the right to have his grievances determined by them. There is nothing accomplished by the adoption of the Code of Procedure, if the intricate distinctions and cumbersome forms of common-law pleading are still to be maintained. If it were necessary to maintain them, in order to determine rights which cannot be determined or obtained under our code procedure, then our Code is inadequate. But such is not the case. Any right which could be obtained under the common-law system of pleading can be as easily obtained under our code procedure. Any wrong which could be redressed under the common-law system, can be as speedily and adequately redressed under our Code, possibly much more so; the Code being broader, simpler, more liberal, and more comprehensive. Then why maintain those distinctions in mere matters of form of pleading? Is it necessary to do so? Is it contemplated by statute? Is it allowed by statute? We are constrained to answer in the negative.

It is true, as stated above, that courts, in determining the rights of parties from a certain condition of facts, quite often, and we might say universally, turn to the common-law precedents to ascertain what the courts, governed by the distinctions made in forms of pleading under the common law, have held under the same circumstances. But in such cases it is not for the purpose of maintaining those distinctions of forms, but to find out what a court, compelled under the common law to recognize those distinctions in forms of pleading, has held, where the facts were the same. For example, what has been the holding under the common-law pleading where a passenger has been wrongfully ejected from a train because of an apparently defective ticket, and where such defect has not been caused by the defendant, but by the negligence or incompetence of the conductor on the road, and where the ejected party has brought suit against the road, under a common-law pleading, for tort; or, on the other hand, under the same condition of circumstances, what has been the judgment of the court where the party brought an action ex con-

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tractu? The decisions of the courts in common-law jurisdictions in such cases are an aid to our statute in adjudicating the rights of parties to an action. This, we think, is the object and end to be obtained. And the right of the plaintiff below to recover, if he had a right of recovery, could not be denied him because of the possible doubt whether, under the common-law pleading, his action would have been *ex contractu*, and not *ex delicto*.

The next question is whether the verdict is excessive. To aid us in a determination of this question, we must look to the decisions, and see what the courts of last resort have held under similar circumstances. Counsel for plaintiff in error cites a number of cases in support of his contention that plaintiff could recover, if anything, only the actual damage sustained in expenses occasioned by the delay and the cost of another ticket. In most of these authorities, however, there was a manifest fault on the part of the plaintiff or on the part of the passenger ejected, and they are not therefore applicable to the case at bar. Some authorities are cited which hold that a passenger, under a similar state of facts, could not recover, other than for the actual expense incurred by the delay. In these we cannot concur. We think the weight of authorities, and by far the better-reasoned authorities, hold the contrary. In the case at bar, the evidence discloses no fault on the part of the passenger. He had purchased a ticket for a round trip. This implied a contract on the part of defendant to carry him to St. Louis and return. If, in fact, the ticket had been punched in the wrong place, it was done by a conductor in defendant's employ along the same line on the forward trip; and the fact that one conductor on the line had made a mistake and punched the ticket in the wrong place might reasonably justify a doubt as to whether another conductor on the same line was correct in his judgment as to where the ticket should have been punched. One conductor is presumed to be as competent as another. The evidence does not show conclusively that the ticket in fact had been punched in the wrong place, and we are unable to say which conductor was in error. The facts are that plaintiff was ejected from the train and delayed in his return through the error of one of two conductors. This being an action against the defendant company for wrongful ejection from the train, it does not matter which of the two conductors was in error. The passenger, being guilty of no fault, was expelled through the fault of the defendant company, through its employees, and under the weight of authorities is entitled to recover such sum as, under the evidence, will compensate him in damages, and the insult, humiliation, and wounds to his feelings may be considered in reaching an estimate. The fact that the conductor who ejected him was correct in his judgment, and was personally without fault in the premises, does not relieve the

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carrier company from liability; nor does the fact that force, violence, or assault was not used, because unnecessary, relieve the company from liability for compensatory damages to his feelings. He was told by the conductor that he would have to leave the train, or pay his fare. He had no money with which to pay his fare. He had a ticket which, but for the fault of the carrier's agent, was evidence of his right to transportation; and the fact that he left the train, rather than provoke a breach of the peace, did not lighten his humiliation nor palliate the wounds to his feelings. Moore on Carriers, 887; Railroad Company *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Curtis *v.* Railroad Company, 87 Iowa, 622, 54 N. W. 339; Railroad Company *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464; Railroad Company *v.* Wilsey, 9 Ky. Law Rep. 1008; Wilson *v.* Railroad Company, 5 Wash. 621, 32 Pac. 469; Jaggard on Torts, vol. 1, 370; Trigg *v.* Railroad Company, 74 Mo. 147, 41 Am. Rep. 305; Hale on Damages, 261-263, and authorities cited; Cyc. vol. 6, p. 555, and notes; Chicago, etc., R. Co. *v.* Holdridge, 118 Ind. 281; Am. & Eng. Enc. of Law (2d Ed.) vol. 5, 718.

From the above authorities, we are of the opinion that, under the evidence in this case, the injury to plaintiff's feelings was a proper element for compensatory damages, the amount thereof having been determined by the jury, from the facts, under proper instructions; and, there being no material error in the record, the judgment of the court below is affirmed.

PER CURIAM. Adopted in whole.

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CHICAGO, R. I. & P. RY. CO. *v.* ARMSTRONG.

(Supreme Court of Oklahoma, Nov. 14, 1911.)

[120 Pac. Rep. 952.]

Carriers—Use of Premises—Exclusion of Persons from Depots.—

A railway company has the right to exclude from its depots and warerooms persons who come there in an intoxicated condition, and who are turbulent and troublesome and disturb and interfere with the agents and employees of the company in the discharge of their work, and may also exclude therefrom those who are reported to be dishonest, and on account of whose past presence in and about its depots and warerooms freight had been removed without the company's consent, and for which it was compelled to pay the consignee the value thereof.

Torts—Interference with Business—Exclusion of Persons from Depots—Actions for Damages—Defenses.—In an action for damages on account of the issuance of a letter, notifying local shippers that a railway company will refuse to allow plaintiff to haul or handle any

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more freight from its depot, and to secure another drayman, it is error to strike from the answer allegations charging that it was necessary, in the course of his business, for the plaintiff so excluded to go about its platform and premises unattended by its agents, and to handle and have access to goods other than those for which he had orders; that, while plaintiff was acting as drayman, merchandise had been taken from its depot without its knowledge or consent, and for which it had been compelled to pay consignee; that said plaintiff was frequently at its depot in an intoxicated condition, was contentious, turbulent, troublesome, and disagreeable, disturbed and interfered with its agents and employees in the discharge of their work; had been arrested and convicted of drunkenness a number of times; had been arrested on the charge of theft, and all of which facts were at the time known to defendant's agents and employees at its local station, where plaintiff had been engaged in carrying on his drayage business—such allegations, if proved, being a justification of the company's act, such as will bar a recovery.

Commissioners' Opinion, Division No. 1. Error from Texas County Court; R. L. Davis, Judge.

Action by F. L. Armstrong against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Plaintiff's petition charged that on and prior to April 27, 1908, he was engaged in conducting for hire a general drayage business in the town of Guymon, Okla.; that as such drayman he hauled freight and express to and from the depot of defendant company for his customers upon their order, and that the services by him rendered were satisfactory; that on April 27, 1908, defendant, acting through its agent and employee, D. P. Bissell, with malicious intent to injure and deprive plaintiff of his usual means of livelihood and to injure him in his business and to boycott him, notified plaintiff's customers in writing that defendant company would no longer allow plaintiff to haul or handle any more freight or express; that the order was as follows: "Guymon, Oklahoma, April 27, 1908. All concerned: We are advised by our special agents to refuse to allow drayman Armstrong to haul or to handle any more freight or express. You will please secure another drayman. [Signed] D. P. Bissell, Agent;" that in the serving of said notices, defendant company acted willfully, maliciously, and without justification, and for the purpose of injuring and depriving plaintiff of his business, and that the acts done did injure and deprive plaintiff of his business, on which he at the time depended for a livelihood for himself and family; that defendant continued to refuse to deliver freight or express to plaintiff, notwithstanding the written orders held by said plaintiff therefor.

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The amended answer of defendant company contains 10 paragraphs. The first is a general denial; the second and third charge in substance that defendant company was at the time a common carrier and maintained at Guymon a depot for storing goods, wares, merchandise, and other property received by freight or for shipment, and that there was at all times contained in said depot a large amount of freight belonging to its patrons, which it held in its custody as a common carrier or as warehouseman; that the freight by it received, whether for shipment from or delivery at Guymon, was unloaded on the platform, and there remained until the same could be stored in its ware-rooms. Paragraph 9 contains a specific denial of any malice toward plaintiff, in the issuance of said notices; says that the same was done for the protection of defendant's property in its charge and under its control, and for which it was responsible. Paragraph 10 charges that if defendant has sustained any loss of patronage, that it was due to his own conduct and habits, and not by reason of any act or fault of defendant company, its agents or employees.

Paragraphs 5, 6, 7, and 8, in substance, charge that the property of plaintiff's patrons was intermingled upon the platform with the property of other shippers, and that, while acting as drayman, it was necessary for plaintiff to go upon defendant's platform and premises unattended by defendant's employees, and to handle and have access to the goods, other than those for which he had orders; that at various times, while plaintiff had been acting as drayman, packages and boxes of goods, wares, and merchandise had been taken from defendant's depot without its knowledge or consent, and that defendant had been compelled to pay for the consignees thereof the value of such goods by reason of their loss; that plaintiff had frequently been to its depot in an intoxicated condition, and was turbulent, troublesome, contentious, and disagreeable, and disturbed and interfered with its agents and employees in the discharge of their work; that he had been arrested, tried, and convicted of drunkenness a number of times in Guymon during the times mentioned in the amended petition; that the agents and employees of defendant company had been informed that plaintiff was of bad reputation, reported to be dishonest, untruthful, and unreliable, and that plaintiff had sold and given away packages and boxes of goods, wares, and merchandise from his dray, which he had removed from the depot of defendant company at Guymon without its consent, and that the agents and employees of defendant company believed said charges and reports were true and that plaintiff was unworthy of confidence, and that such a person should not be permitted to have access to its warerooms, and that a short time prior to the acts complained of in plaintiff's

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petition plaintiff had been arrested in the town of Guymon on the charge of stealing money, and that defendant's agents and employees at Guymon knew of such charge and report, and that from all the charges concerning said plaintiff, known to the agents and employees of defendant company at the time, it was believed that such plaintiff was untrustworthy and not a suitable and safe person to permit to have access in and around its depot and warehouse, such as was usually accorded to draymen at said depot. Plaintiff thereupon filed a motion to strike from the answer paragraphs 4, 5, 6, 7, 8, 9, and 10, because it was charged that the same did not constitute a defense to plaintiff's amended petition. This motion was sustained in part, the court striking from the answer paragraphs 5 to 8, inclusive, which action of the court, among others, is assigned in this court as error.

M. A. Low, C. O. Blake, E. E. Blake, and H. B. Low, for plaintiff in error.

Wiley & Edens, for defendant in error.

.SHARP, C. (after stating the facts as above). It is indispensable to the successful carrying on of the business of a railway company that passenger and freight depots be maintained at stations along its line. In Oklahoma this is made mandatory by section 26, art. 9, of the Constitution, which provides: "It shall be the duty of each and every railway company, subject to the provisions herein, to provide and maintain adequate, comfortable, and clean depots, and depot buildings, at its several stations, for the accommodation of passengers, and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing, and delivering of all freight handled by such roads." The liability of a railway company for freight under its charge and in its custody varies from insurance to reasonable care, depending upon whether the relationship existing is that of carrier or warehouseman; but, in either event, there exists on the part of the carrier a duty and attendant liability, dependent upon the facts and the law applicable thereto.

[1] There being imposed upon the carrier the legal duty to provide and maintain a suitable freight depot and building for the receiving, handling, storing, and delivery of all freight received and forwarded by it, for the accommodation of its patrons, as well as for its own benefit, there is impliedly conferred upon it, as a necessary incident of its business, the right to exercise over its depots and station grounds such reasonable control and supervision as is necessary in the discharge of its duty to the public, and for the convenience, comfort, and safety of its

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patrons, as well as for its own protection. *Donovan v. Pennsylvania Railway Co.*, 199 U. S. 284, 26 Sup. Ct. 91, 50 L. Ed. 198. That a railway company, both as the owner of the depot and station grounds connected with the road and as a carrier of freight, has authority to make reasonable and suitable regulations in regard to those making use of its property, and so long as the same remain reasonable and not in violation of some law or some regulation made in pursuance thereof, we think cannot be denied. Such regulations may depend largely upon local conditions. In order to be able to perform these imposed duties, it is requisite that the right to make reasonable rules and regulations for the conduct of its business be given. In the proper discharge of its business, it is not simply empowered, but is bound to exercise proper control over its property and the property of others intrusted to its care. This power, which must be conceded, must of necessity be exercised through its officers, agents, and employees, which is the only mode by which a corporation can exercise its powers. While it may be said that by opening the doors to its depots, the company gives an implied license to any and all persons to enter, it may be answered that by so doing, it *prima facie* gives an implied license, but such license is revocable in its nature, and, if actually revoked and due notice given to an individual or class of individuals, and they still persist in entering without a license, the owner has the right to exclude them by force, if necessary. *Commonwealth v. Power et al.*, 7 Metc. (Mass.) 602, 41 Am. Dec. 465; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 341.

In *Summitt v. State*, 8 Lea (Tenn.) 413, 41 Am. Rep. 637, it is said in the syllabus: "A railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules, however, must be reasonable, and such as do not unnecessarily infringe upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel."

In *Commonwealth v. Power*, *supra*, it was said by Shaw, C. J.: "That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management. That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots, for any purpose. * * * Or if the presence of such persons, for such purpose, is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation, as

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passenger carriers; then the prohibition of such persons from entering upon the platform is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked."

In *Thurston v. Union Pacific Railroad Co.*, 4 Dill. 321, Fed. Cas. No. 14,019 it was claimed that the plaintiff, who had purchased a ticket for transportation, was a notorious gambler and was then engaged in traveling on its road for the purpose of plying his calling. The court said: "It would be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime. * * * As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. * * * Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury." 6 Cyc. 550.

Such regulations as will enable a railway corporation to execute its difficult and responsible duties, insure the comfort of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided always that such regulations are reasonable and just. *Hutchinson on Carriers*, §§ 989, 1078. In its passenger service, it has the right to require that all passengers shall preserve order; that they shall be seated and not stand up in the passageways or upon the car platforms, and that they shall abstain from any act which tends to impede or interrupt the conductors and other employees in the transaction of their necessary business. Reasonable regulations may not only be prescribed, but enforced by such reasonable means as the company may have at its command; for, without some use of power to give them effect, such regulations would be of little value. *Hibbard v. New York & Erie Ry. Co.*, 15 N. Y. 458. The same rule should be applied with like force to those having business with the carrier concerning freight, and who may have a right to enter the depots or station grounds of the company. Certainly, it would not be said that a railway company, having the admitted right to evict from its train or station grounds those violating its reasonable rules and regulations, and with whom it may be at the time under contract for transportation, cannot exercise a similar authority, on proper occasions and under justifiable circumstances, over one to whom it does not directly have any contract relation, but who is acting

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independently of the company, either as a contractor, or for hire in serving its local patrons. Undoubtedly the authority exists to exercise the same reasonable control over its warerooms and depots and freight in its charge, whether indoors or upon its platforms, as it has over its equipment used in its passenger service.

In *Decker v. Atchison, etc., Ry. Co.*, 3 Okl. 553, 41 Pac. 610, it is said: "There is no doctrine of corporation law better settled than the right of a railroad corporation to prescribe reasonable rules and regulations for the government and use of its property. The only restriction under the law is that the rules must be reasonable."

That a railway company has the right to exercise reasonable control over those using for the time being its property must follow as a necessary incident to the right of property. It is not bound to admit to its depots and station grounds those who refuse to obey the company's reasonable rules and regulations, or who are guilty of gross and vulgar habits or conduct, or who make a disturbance, or are turbulent and troublesome, or those under the influence of liquor, who interfere with the agents and employees of the company in the discharge of their work, or whose reputation for honesty is bad, and which facts are known to the agents and employees at the time; and, a fortiori, whose characters are unequivocally bad; nor is it bound to admit to its premises those whose presence would interfere with the interest or patronage of the proprietors, so as to make the business less lucrative to them. *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258. In this case, Story, J., said: "I think the proprietors had the right to inquire into such intent and motives, and to act upon the reasonable presumptions, which arose in regard to them. Suppose a known or suspected thief were to come on board. Would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board, who was habitually drunk and gross in his behavior, and obscene in his language, so as to be a public annoyance. Might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be."

It was said by the court in *Harris v. Stevens*, *supra*, speaking of an implied license to enter the station house of the railway company: "The existence of this right in a corporation would seem to be indispensable to the comfort of the passengers in going to and from the cars, and in transacting that business with the agents of the company, which is necessarily done at the stations, and also the protection of property intrusted to its care for the safety of which it is held to the strictest accountability."

It is not necessary that those in charge of the property of a

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railroad company be compelled to wait until some covert act, theft, or other offense be committed, that they may act to prevent the occurrence or recurrence of such act or offense. It is quite important and essential that it have authority to prevent, as the power to stop or repress the commission of wrongful acts. *Vinton v. Middlesex Railway Co.*, 11 Allen (Mass.), 304, 87 Am. Dec. 714; *Exton v. Central Railroad of New Jersey*, 63 N. J. Law, 356, 46 Atl. 1099, 56 L. R. A. 508; *New Orleans, etc., Railway Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Pittsburgh, etc., Railway Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

The objections may be made that the exercise of such power is liable to abuse and may become the instrument of oppression, but the same is true of many other salutary rules of law. The safeguard against any unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct, past or present, of a person was such as to render it reasonably certain that, if permitted, he would again continue his former course of conduct.

[2] Such being the case, it was error in the trial court to strike from defendant's answer those paragraphs thereof which set up specifically and generally the alleged bad character of plaintiff. These were issues that defendant had the right to have tried out. If true, they would justify the defendant in the action of its agent in sending out the letters complained of; while, on the other hand, if upon the trial, it should be found that the charges so stricken out were in fact untrue, it would go to show that defendant, through its agent, acted without proper justification in the premises.

Having reached this conclusion, we think also it was error for the court to give the fifteenth instruction, as follows: "You are further instructed that plaintiff had a right to receive freight, express and baggage at the depot of the defendant so long as his customers, the consignees of such goods, were willing for him to haul it; and the fact that the plaintiff was a thief or a drunkard would not in law justify the defendant in refusing him that right." While one known to be a thief or a drunkard has the right to engage in honest employment, it does not follow, as in the case under consideration, that such a case by reason of such employment has the absolute and unqualified right to go unattended upon and about the premises of one, not his employer, disturbing and interfering with the agents and employees of such third party, while in the discharge of their work.

Counsel for defendant in error in this cause are admonished against the use of argument such as made during the trial below. While, in the heat of argument, attorneys often say things they do not intend, still the language used in this case is of such

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extreme nature that it is hard for us to believe that the same was not said with the intent to influence the action of the jury, by appealing to that bias and prejudice which so often exists in such cases.

Because of the action of the court in striking paragraphs, 5, 6, 7, and 8 from defendant's amended answer, and in giving instruction No. 15, the judgment of the court below should be reversed, and the cause remanded with instructions to proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

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(Supreme Court of Indiana, Feb. 13, 1912.)

[97 N. E. Rep. 434.]

Carriers—Carriage of Passengers—Injuries—Complaint—Requisites.—A complaint for the death of a passenger which shows that decedent was a passenger; that by the negligence of the carrier's servants he was carried beyond his station; that the conductor ordered him to alight where there was no platform and while the train was running, but after it had decreased its speed; and that decedent, being not able to judge of the speed of the train, relied on the judgment of the conductor, and alighted and was injured—states a cause of action as against a demurrer.

Carriers—Carriage of Passengers—Injuries—Complaint—Requisites.—To justify the sustaining of a demurrer to the complaint in an action for the death of a passenger, the complaint must either fail to show that there was negligence of the carrier or else must show that the passenger was guilty of contributory negligence.

Carriers—Carriage of Passengers—Injuries—Care Required.*—A carrier of passengers must exercise the highest degree of care for

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see foot-note of *St. Louis, etc., Ry. Co. v. Purifoy* (Ark.), 41 R. R. R. 526, 64 Am. & Eng. R. Cas., N. S., 526; *Denver City Tramway Co. v. Hills* (Colo.), 41 R. R. R. 505, 64 Am. & Eng. R. Cas., N. S., 505; *Central Kentucky Tract. Co. v. Combs* (Ky.), 41 R. R. R. 485, 64 Am. & Eng. R. Cas., N. S., 485; last paragraph of first foot-note of *Le Dean v. Northern Pac. Ry. Co.* (Idaho), 41 R. R. R. 232, 64 Am. & Eng. R. Cas., N. S., 232; second head-note of *Parker v. Boston & M. R. R.* (Vt.), 41 R. R. R. 153, 64 Am. & Eng. R. Cas., N. S., 153; foot-note of *Stephens v. Oklahoma City Ry. Co.* (Okla.), 40 R. R. R. 569, 63 Am. & Eng. R. Cas., N. S., 569; *Birmingham, etc., Co. v. Yates* (Ala.), 40 R. R. R. 170, 63 Am. & Eng. R. Cas., N. S., 170; first head-note of *Kennedy v. Chesapeake & O. Ry. Co.* (W. Va.), 40 R. R. R. 152, 63 Am. & Eng. R. Cas., N. S., 152; last head-note of *Pittsburg, etc., Ry. Co.*

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the safety of its passengers and is liable for the slightest negligence, and it is negligence to induce a passenger to leave a train in motion.

Carriers—Carriage of Passengers—Injuries—Contributory Negligence—Alighting from Moving Train.†—It is not negligence per se for a passenger to alight from a slowly moving train, especially when he alights pursuant to the orders of the conductor, and the question of contributory negligence is ordinarily for the jury.

Depositions—Use as Evidence—"Same Cause"—Taken in Other Cause.—An action by a passenger against a carrier for personal injuries and an action by his administrator against the carrier for his negligent death are for the same cause and between the same parties or their representatives within Burns' Ann. St. 1908, § 456, and a deposition of the passenger taken in the action by him is admissible in evidence in the action by the administrator.

Depositions—Evidence—Admissibility—"On File."—The withdrawal of the deposition of a party from the files of the state circuit court where the action was begun for use on the trial of the action in the federal court after removal to the federal court does not prevent the use of the deposition on a subsequent trial within Burns' Ann. St. 1908, § 456, permitting the use of depositions provided they remain on file from the time the former action was dismissed until the time at which it was proposed to use them in a subsequent action.

Evidence—Testimony on Former Trial—Admissibility.—The rule that the testimony of a deceased witness in a former action may be given in evidence in a subsequent action on specified condition applies to testimony given by depositions as well as to oral testimony, and Burns' Ann. St. 1908, § 456, permitting the use of depositions taken in one action in another action on the same cause of action, does not change the rule, and a deposition of a party since deceased taken subject to the cross-examination is properly received in evidence in the same cause of action brought by the administrator of the deceased party against the adverse party.

Appeal and Error—Pleading—Review—Discretion of Court—Amendment of Pleading.—The granting or refusal of amendments

v. Grom (Ky.), 39 R. R. R. 747, 62 Am. & Eng. R. Cas., N. S., 747; third head-note of Glennen v. Boston, etc., Ry. Co. (Mass.), 39 R. R. R. 455, 62 Am. & Eng. R. Cas., N. S., 455; last foot-note of Washington, etc., Ry. Co. v. Vaughan (Va.), 39 R. R. R. 444, 62 Am. & Eng. R. Cas., N. S., 444; second head-note of Houston, etc., R. Co. v. Bush (Tex.), 39 R. R. R. 428, 62 Am. & Eng. R. Cas., N. S., 428; second head-note of Pelot v. Atlantic, etc., R. Co. (Fla.), 39 R. R. R. 369, 62 Am. & Eng. R. Cas., N. S., 369; last head-note of Hill v. Minneapolis St. Ry. Co. (Minn.), 39 R. R. R. 107, 62 Am. & Eng. R. Cas., N. S., 107; third head-note of Indiana Union Traction Co. v. Keiter (Ind.), 38 R. R. R. 545, 61 Am. & Eng. R. Cas., N. S., 545; second foot-note of Florida Ry. Co. v. Dorsey (Fla.), 37 R. R. R. 556, 60 Am. & Eng. R. Cas., N. S., 556.

†See foot-note of Southern Ry. Co. v. Morgan (Ala.), 41 R. R. R. 168, 64 Am. & Eng. R. Cas., N. S., 168.

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to pleadings is in the discretion of the trial court, and the court on appeal will not interfere unless there has been an abuse of discretion.

Pleading—Discretion of Court—Amendment.—Where the original complaint in an action against a nonresident demanded a judgment in excess of \$2,000, the allowance of an amendment reducing the demand below \$2,000, and thereby preventing a removal of the cause to the federal court, was not an abuse of discretion; though the only reason for making the amendment was to prevent a removal.

Removal of Causes—Amount or Value in Controversy—Reduction.—Where the original complaint in an action against a nonresident demanded judgment for more than \$2,000, and plaintiff moved to amend the complaint, reducing the demand to less than \$2,000, a subsequent petition by the nonresident to remove the cause to the federal court was properly denied.

Appeal and Error—Assignment of Errors—Special Answer.—A special plea to an assignment of error is required where matters have occurred since the appeal was taken which renders the attack on the judgment of the trial court unavailing.

Appeal and Error—Assignment of Errors—Special Plea.—Where the state court refused to remove a cause to the federal court, and a judgment was rendered against the party applying for the removal, and prior to the filing of its appeal from the judgment the federal court on his application adjudged that it had no right of removal, the question of the right of removal was eliminated from the appeal, and an assignment of error complaining of the refusal to remove may be met by a special plea alleging the facts.

Trial—Reception of Evidence—Sending Jury from Courtroom.—The reading to the court in the presence of the jury of the transcripts of proceedings in a former action to show the dismissal of the former action and the identity of issues and parties preliminary to the introduction of a deposition of a party to the former action, since deceased, is not ground for reversal, in the absence of any request that the jury be sent out during the reading.

Trial—Argument of Counsel—Comments on Evidence.—Where evidence was admitted to inform the court of the admissibility of a deposition, the evidence was not a proper subject of comment in the argument to the jury.

Trial—Argument of Counsel—Objections.—Where a party excepted to the argument of counsel of the adverse party, and asked the court to instruct the jury that the argument was improper, and the court stated that the jury were not to be influenced by the argument, and no further objection was made, no question based on misconduct of counsel was presented for review.

Interest—Money Judgments.—Under Burns' Ann. St. 1908, § 793, providing that interest on money judgments shall be from the date of the verdict until satisfied, interest on the amount awarded plain-

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tiff suing for negligent death runs from the date of the verdict on the amount thereof where judgment is rendered thereon, and the judgment should so provide.

Appeal from Circuit Court, Marshall County; Harry Bernetha, Judge.

Action by Susan Huffman, administratrix, against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, and it transferred the cause to the Supreme Court under Burns' Ann. St. 1908, § 1405. Affirmed.

W. H. H. Miller, C. C. Shirley, Samuel D. Miller, and John B. Cockrum, for appellant.

Charles Kellison, McConnell, Jenkins, Jenkins & Stuart, and M. Winfield, for appellee.

Cox, J. The appellee's decedent, John W. Huffman, was a passenger on one of appellant's trains returning from Columbus, Ohio, to Peru, Ind. At Tipton appellant's two lines of railroad intersect each other; the one on which he came from Columbus continuing westward and the other from the south running north through Tipton to Peru. He should have changed cars at Tipton to reach his destination, but did not for the reason that he was not used to traveling on a railroad, and the conductor of the train from the east told him that he would not have to change and to stay on that car, which he did. Another conductor took charge of the train at Tipton, and it proceeded towards its westward destination. As the train was leaving that city, this conductor discovered that Huffman was on the wrong train, and should have changed, and so informed him. He offered to get off if the conductor would stop the train. The conductor gave the signal to stop, and Huffman started to the platform. When he reached there, while the speed of the train had been checked, it had not stopped, but, notwithstanding this, the conductor ordered him to get off, and he did so, and was severely injured. His injuries did not result in immediate death, and he brought an action for damages therefor in the Fulton circuit court. Upon the petition of appellant the case was removed to the United States Circuit Court, and while it was pending there Huffman died. Susan Huffman, his wife and administratrix, was there substituted, a trial was had which resulted in a disagreement of the jury, and the action was thereupon dismissed. The appellee then brought this action in the Fulton circuit court to recover damages for the death of Huffman, and joined with the appellant as a defendant George W. Dillon, the conductor who had ordered him off of the train. The action was subsequently dismissed as to Dillon. A change of venue was taken

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to the Marshall circuit court, and in a trial there a verdict for \$1,999.99 was returned against appellant.

[1] It is first contended by counsel for appellant that error was committed by the trial court in overruling appellant's demurrer to the complaint. The complaint is long, and need not be set out. It shows that the decedent was appellant's passenger; that by the negligence of appellant's servants he was carried beyond the station where he should have left the train. It shows that, being unused to traveling, he was led to believe by the statement of one of appellant's conductors that he was on a car which would take him to his home without a change; that this mistake was discovered, and he was abruptly made acquainted with the fact that he was being carried another way and away from the place where he should have changed cars. It shows that the conductor of the train undertook to set decedent off of the train so that he might return to the station and signaled the train to stop for that purpose, but that before the train stopped, after it had decreased its speed, he ordered the deceased to get off at a place where there was no platform or landing; and that the deceased, not being able to judge the speed of trains and that it was dangerous to do so, relied on the judgment of the conductor, and jumped off and was hurt.

[2] To justify the sustaining of a demurrer, a complaint in such an action must either fail to show that there was negligence on the part of the defendant, or else must show that the passenger was guilty of contributory negligence.

[3] Appellant as a carrier of passengers was chargeable with the highest degree of care and liable for the slightest negligence in the exercise of such care. It has been held that it is negligence for an officer or agent of a railroad company to induce a passenger to leave a train which is in motion. *Evansville, etc., R. Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. Rep. 303; *Jones v. Chicago, etc., R. Co.*, 42 Minn. 183, 43 N. W. 1114; *Filer v. N. Y., etc., R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Filer v. N. Y., etc., R. Co.*, 59 N. Y. 351; *Bucher v. N. Y. Central R. Co.*, 98 N. Y. 128; *Eddy v. Wallace*, 49 Fed. 801, 1 C. C. A. 435; *Hutchinson on Carriers* (3d Ed.), § 1221. It was, it appears from the allegations of the complaint, through the fault of one of appellant's conductors that Huffman remained on the train when he should have got off at the station. This being so, the least that could be done and fulfill the duty appellant owed him was to give him the opportunity to alight safely. Manifestly the duty was not discharged by compelling him to alight safely. Manifestly the duty was not discharged by compelling him to alight without bringing the train to a stop.

[4] It does not appear from the complaint that Huffman was guilty of contributory negligence. It is not negligence per se

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for a passenger to alight from a slowly moving train. Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443; Pennsylvania R. Co. v. Marion, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. Rep. 330; Louisville, etc., R. Co. v. Bean, 9 Ind. App. 240, 36 N. E. 443; Harris v. Pittsburgh, etc., R. Co., 32 Ind. App. 600, 70 N. E. 407. And especially is this true when the passenger alights by the direction or order of one in authority on the train, as the passenger must ordinarily obey the reasonable commands and directions of those in charge of the train, and has the right to assume to some extent at least that he will not be ordered or directed into danger. The question of the passenger's contributory negligence is ordinarily a question of fact under the circumstances. Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Cincinnati, etc., R. Co. v. Carper, 112 Ind. 27, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; Louisville, etc., R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662; Louisville, etc., R. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107; Pittsburgh, etc., R. Co. v. Gray, 28 Ind. App. 588, 64 N. E. 39; Thornton on Negligence, §§ 1815, 1824, 1825, 1924. See, also, the cases above cited. There was no error committed in overruling the demurrer to the complaint.

[5] While the action of John W. Huffman was pending, his deposition, touching the facts upon which it was brought, was taken, and subsequently used as a part of the plaintiff's evidence in the trial in the United States court. At the time of the accident Huffman was traveling alone, and an action for his injuries or death must succeed if at all on his testimony as to the facts connected with his injury as the testimony of no other witness was available. The trial court sustained the motion of Dillon, the conductor, to suppress the deposition as to him; he not having been a party to the action in which it was taken. A like motion of appellant was overruled, and the deposition admitted in evidence against it. This latter action of the court it is claimed was the commission of reversible error against appellant. It is argued that the right of appellee to avail herself in this case of the testimony of her deceased husband given in the former trial depends on section 456, Burns 1908, which reads as follows: "When an action has been dismissed, and another action has been commenced for the same cause, the depositions taken in the first action may be used in the second or any other action between the parties, or their assignees or representatives, for the same cause: but it must appear that the depositions have been duly filed in the court where the previous cause was pending and have remained on file from the time the action was dismissed until the time at which it was proposed to use them." It is urged that the deposition could not be used as evidence in this action, for the reason that this is not an action for the "same

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cause," and that, by reason of making Dillon a party to this action when he had not sustained that relation to the first action, it was not a "second or any other action between the same parties." The principle upon which such evidence is admitted is that there has been given the opportunity and right of cross-examination. Dillon had not, and as to him the court suppressed and excluded the deposition. I Greenleaf on Evidence (15th Ed.) § 164. Moreover, the case was dismissed as to Dillon. But appellant had been a party to the other action, was given and availed itself of the opportunity to cross-examine, and its objection on account of a difference of parties is not well taken. *Town of Walkerton v. Erdman*, 23 Can. S. C. 352. That the two actions were for the "same cause" and between "the parties, or their representatives," is not an open question in this state so far as the right to use in the subsequent case the testimony of a witness given on the first trial, where such witness has thereafter died, is concerned. *Indianapolis, etc., R. Co. v. Stout*, Adm'r, 53 Ind. 143. See, also, *Erdman v. Town of Walkerton*, 22 Ont. 693; *Erdman v. Town of Walkerton*, 20 Ont. App. 444; *St. L. Ry. Co. v. Hengst*, 36 Tex. Civ. App. 217, 81 S. W. 832; *Town of Walkerton v. Erdman*, supra, which is a cause almost identical in all respects with the one before us.

In the matter of the identity of cause and parties the section of our statutes does no more than to restate the common-law rule which permits the use of former evidence in subsequent trials without in any way restricting it. This rule which is old and universally recognized as a rule of necessity to the end that justice shall not fail, and that a litigant should be entitled to prove his case by the best evidence at his disposal, is thus stated: "The testimony of a deceased witness in a former action or in a prior stage of the same action may be given in evidence in a subsequent action, provided (1) that the party against whom such testimony is offered (or a person identified with him in legal interest) had, at the time such evidence was originally given, the right and opportunity of cross-examining such witness upon the matters covered by the testimony offered; and (2) that the parties and the issue in the two actions are substantially the same." Chamberlayne's Best on Ev. Notes 1908, § 496; Greenleaf on Ev. (15th Ed.) §§ 163-168; Stephen's Digest of the Law of Evidence, p. 44; Taylor on Ev. § 464; Elliott on Evidence, §§ 495, 1186, note; Chamberlayne's Modern Law of Ev. c. 22, p. 2083. Where the subject is exhaustively treated, 13 Cyc. 1004; 16 Cyc. 1088.

[6] It is further contended that, under the provisions of section 456 set out above, it must appear that the deposition has remained on file in the court in which the former action was pending from the time that action was dismissed until the time at

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which it was proposed to use it; and that as this does not appear, but the contrary, the deposition for that reason should have been suppressed. The deposition, as has been stated, was taken in the action of John W. Huffman while it was pending in the Fulton circuit court and was there filed. Afterwards it was incorporated in the transcript on removal to the United States court at the instance of one of the attorneys for appellant. By order of the federal judge it was eliminated from the transcript and ordered returned to the files of the Fulton circuit court, which was done. It was withdrawn thence by one of the attorneys for appellee, who left his receipt therefor with the clerk for use in the trial in the federal court. It was thereafter returned by him, and remained on file continuously with the clerk of the Fulton circuit court until he produced it in the Marshall circuit court for use in the trial of the case, except that one of appellant's attorneys had temporarily taken it from the files for examination a few days before this trial. If the provision of the section should be held to be as serious an obstruction to the admission of the deposition as contended, it would instantly be manifest that appellant could not take advantage of the acts of its own attorneys in removing it from the files. The only basis, then, for the claim that the deposition was rendered inadmissible by reason of not being continuously on file is the fact that it was taken by counsel for appellee for use in the trial in the federal court. The statute should not be given such a narrow construction. There is no pretense that the deposition did not remain the same, or that any harm resulted to appellant from the temporary removal from the files. Ordinarily the mere fact that a deposition has been temporarily withdrawn from the office of the clerk after it has been filed there and then returned will not render it inadmissible. 6 Encyc. of Pl. & Pr. 561. The general rule that depositions should remain on file in the office of the clerk does not prevent a temporary withdrawal by permission of the clerk for such necessary purposes as inspection and to make copies. 13 Cyc. 966.

And it has been held that taking a deposition from the files and out of the county without leaving a copy in violation of a rule of court did not render the deposition inadmissible. The court held that the rule was not to be held destructive of the deposition, but rather to preserve the evidence which it furnished. *Dailey v. Green*, 15 Pa. 118. In *Moran v. Green*, 21 N. J. Law, 562, the deposition of a foreign witness had been taken on a commission issued from the Supreme Court of the state. The statute required the deposition to be deposited with the clerk of that court, "there to remain as a record." It was held that a temporary withdrawal from the files of that court for use in the circuit on the trial of a cause did not prevent its subsequent use.

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It was said by the judge who spoke for the court: "If we are to give a literal meaning to the words 'there to remain,' the document can never be lawfully removed. But I apprehend this was not the intention of the Legislature. * * * It can mean nothing more than that it shall remain as a file of the court and under its control." See, also, *Hogaboom v. Price*, 53 Iowa, 703, 6 N. W. 43; *Harris' Appeal*, 58 Conn. 492, 20 Atl. 617. We are constrained to hold in this case that the withdrawal of the deposition from the files of the Fulton circuit court for use on the trial in the federal court did not render it inadmissible. The clerk of the former court to whose custody it was committed testified that with the exceptions above noted it has been constantly on file until he carried it in response to a subpoena, to the court in which the trial was had. It was constructively on file in that office all the time required by the statute.

[7] Moreover, if it should be conceded that the provision in question creates a condition as arbitrary as is contended for relating to the admissibility of a deposition in a subsequent suit, still it does not indicate an intention on the part of the Legislature to overthrow the above-mentioned, long-standing rule of the law of evidence relating to the former testimony of a deceased witness. That rule applies to testimony given by depositions as well as to oral testimony in court, and by virtue of it, if not by the statute, the court properly admitted the depositions. The death of Huffman made it possible to use his deposition in the trial of the first action. The substantial identity of the issue and of the parties in this action with the former established the relevancy of the testimony embodied in the deposition in this case. No reason is evident for its exclusion in this case which would not have also applied when offered and used in the first; and no reason exists for its admissibility in the first case which does not argue as forcefully for its admissibility in this. When a witness who was present in court and testified orally in a case has died, the rule permits that testimony to be proved, in substance, in a subsequent trial of the same case, or in another case in which the issue and parties are substantially the same, by the uncertain and inexact memory of one who heard the witness testify and assumes to be able to remember it. *Horne v. Williams*, 23 Ind. 37; *Rooker v. Parsley*, 72 Ind. 497; *Chamberlayne's Modern Law of Ev.* §§ 1682-1687.

Here, in the second case, the testimony of the dead witness is offered exactly as it was given in the first. As said by the author of a late and scholarly work on evidence: "It is not a synopated condensation of the evidence of the witness. It is his evidence, given, tested, and preserved with knowledge on the part of all concerned in taking it that it may and probably will be used on some subsequent occasion as the statement of the witness."

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Chamberlayne's Mod. Law of Ev. § 1708. Obviously the probative force of the evidence of what the testimony of the witness was in the former case would be far greater in the last instance than in the first. This, it is true, may go more to the weight of the evidence than to its admissibility, but it does show that the application of the rule of evidence in question to this case is more surely promotive of justice than in a case where the oral testimony of a deceased witness is to be proved orally by another witness who speaks from memory, and in this a reason for the application of the rule appears. 16 Cyc. 1088, 1089; Elliott on Evidence, § 1186, note; Chamberlayne's Mod. Law of Ev. c. 22, p. 2083 et seq.; Town of Walkerton *v.* Erdman, *supra*; Erdman *v.* Town of Walkerton, *supra*; St. L. Ry. Co. *v.* Hengst, *supra*; Maine Stage Co. *v.* Longley, 14 Me. 444. In St. Louis, etc., Railway Co. *v.* Hengst, *supra*, a case decided by the Texas Court of Civil Appeals and in which a writ of error was refused by the Supreme Court of that state it was held that the deposition of a witness, taken under a statute which limited the use of the deposition to the action in which it was taken, was admissible, under the rule of evidence under consideration, in a subsequent action where the issue and parties were in substance the same and the witness was dead. To the same effect in Maine Stage Co. *v.* Longley, *supra*. It has been held under this rule that the former testimony of a deceased witness was provable by the shorthand writer's or the judge's notes of the evidence in another action, even though other evidence was available to prove the same facts. Wright *v.* Doe ex dem. Tatham, 1 Ad. & El. 3, 28 E. C. L. 28. If the correctness of this decision be conceded, there would seem to be no escape from the conclusion that the rule is properly applicable here; for it is said to be the administrative duty of the court to protect the substantive right of the party to prove his contention, so far, at least, as the *res gestæ* are concerned, by the most probative evidence reasonably within his power. When the proponent's necessity for producing a secondary grade of evidence is established, the right to submit it will be recognized by the court. Chamberlayne on Ev. § 1620. After the trial court suppressed the deposition of John W. Huffman as against Dillon, thereby leaving appellee's action as to him without material support by evidence, Dillon at the conclusion of all the evidence in the case filed a motion for a peremptory instruction for a verdict to be returned in his favor. Appellee then filed a waiver of all claims for damages in excess of \$1,999.99 and request for leave to amend the prayer for damages by making such prayer a demand for that sum only. This was followed immediately by a dismissal of the cause as to Dillon. Thereupon appellant filed its petition and bond for removal of the cause to the United States Circuit Court, alleging in the petition that it was an Illi-

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nois corporation, that appellee was a citizen of Indiana, and that the matter in dispute, exclusive of interest and costs, exceeded \$2,000, which petition was denied. A motion by appellant to strike out appellee's waiver and request for leave to amend was overruled and such leave granted, and the trial proceeded and resulted in a verdict for the sum of \$1,999.99.

[8] It is contended by appellant that the court erred in permitting appellee to amend the complaint by reducing the demand. It is well settled that the trial court may use its discretion in granting or refusing permission to amend the pleadings, and that this court will not interfere unless it is clearly shown that there has been an abuse of discretion by which the complaining party has been harmed. *Chicago, etc., R. Co. v. Jones*, 103 Ind. 389, 6 N. E. 8; *Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92; *Chicago, etc., R. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477; *Wabash, etc., Ry. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Lindley v. Sullivan*, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815; *La Plante v. State*, 152 Ind. 80, 52 N. E. 452; *Whitcomb v. Stringer*, 160 Ind. 82, 66 N. E. 443; *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 646, 655, 70 N. E. 985; *Smith v. Byers*, 20 Ind. App. 51, 49 N. E. 177; *Case v. Moorman*, 25 Ind. App. 293, 58 N. E. 85; *Citizens' St. Ry. Co. v. Heath*, 29 Ind. App. 395, 62 N. E. 107.

[9] But it is claimed that appellant was harmed in its right to have the cause removed to the federal court, upon the dismissal as to Dillon, by the amendment in this case which reduced the demand below the sum, \$2,000, which with diversity of citizenship makes a cause removable. It does not seem, however, that any injustice was done appellant by the amendment. The complaint originally might have demanded only \$1,999.99, and appellant would not, in that event, have been entitled to a removal, regardless of whether Dillon was or was not a party defendant. An amended complaint is considered as if it had been originally filed as amended.

It is further contended that it is error to permit an amendment except on good cause shown, and it is argued that the court erred in permitting the amendment in this case since appellee's only reason for amending was in order to prevent a removal to the federal court. Even if that was the only reason, yet we cannot say that the court could not, within its discretion, consider the reason good cause for the amendment and promotive of the speedy conclusion of a cause which had been practically finished. In *Maine v. Gilman* (C. C.) 11 Fed. 215, it is said: "It cannot injure the defendant to have the damages diminished excepting that it would prevent his removing the cause to the Circuit Court. It may be taken for granted that this was the motive of the plaintiff in offering his amendment. But, if it were, the motive is not illegal."

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[10] It is next asserted by appellant that the court erred in overruling its petition to remove the cause to the United States Circuit Court for the reason that the amendment of the complaint reducing the amount in controversy was not in fact made until after the petition for removal was filed and the bond approved. Numerous cases are cited by appellant which hold that, when a sufficient petition and bond have been filed, an amendment thereafter cannot defeat the jurisdiction of the federal court. It has been held, however, that, if the motion to amend precedes the petition to remove, the suit is not removable, even though the amendment has not actually been made. *Waite v. Phoenix Ins. Co.* (C. C.) 62 Fed. 769, 770.

As the action to amend preceded the petition to remove in this case, it would seem that at the time the petition was presented the action was not removable. Indeed, it may well be doubted whether, if the amendment had not been proposed or made and the demand of the complaint had been left as originally made in excess of the sum of \$2,000, the action would have been removable. The case of *Powers v. Chesapeake, etc., Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, by authority of which appellant claims the right of removal in this case, has been somewhat limited by later decisions of the Supreme Court of the United States. In the case of *Lathrop, etc., Co. v. Interior, etc., Co.*, 215 U. S. 246, 30 Sup. Ct. 76, 54 L. Ed. 177, it was held that: "Where plaintiff in good faith insists on the joint liability of all the defendants until the close of the trial, the dismissal of the complaint on the merits as to the defendants who are citizens of plaintiff's state does not operate to make the cause then removable as to nonresident defendants, and to prevent the plaintiff from taking a verdict against the defendant, who might have removed the cause if sued alone, or if there had originally been a separable controversy as to them." In *Alabama G. S. Ry. Co. v. Thompson*, 200 U. S. 206, 217, 26 Sup. Ct. 161, 165 (50 L. Ed. 441), it was said: "The right to remove depends upon the case made in the complaint against both defendants jointly, and that right in the absence of a showing of fraudulent joinder did not arise from a failure of the complainant to establish a joint cause of action." See, also, *Chicago, etc., R. Co. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303; *Kansas City, etc., Ry. Co. v. Herman*, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. Ed. 76; *Southern Ry. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907; *Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, 70 Pac. 1100; 60 L. R. A. 949; *Illinois Cent. R. Co. v. Harris*, 85 Miss. 15, 38 South. 225; *Cincinnati, etc., Ry. Co. v. Evans, Adm'r*, 110 S. W. 844, 33 Ky. Law Rep. 596. Under the allegations of the complaint, the conductor and appellant were joint

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wrongdoers, and there is no pretense that there was a fraud in joining the former with the latter as a defendant. The action was prosecuted against both in apparent good faith, and failed as against the conductor only because the exclusion of the deposition as to him worked a failure of proof against him.

[11] Moreover, a final and conclusive reason exists prohibiting a reversal of this case for action of the trial court denying appellant's petition to remove. So much of the appellant's assignment of error as relates to the action of the trial court in denying appellant's petition to remove has been met in this court by a verified answer in bar showing that appellant, after verdict and before judgment of the Marshall circuit court, invoked the jurisdiction of the United States Circuit Court on the question of its right to remove the cause, and showing, further, that that court upon the petition of appellee remanded the cause to the state court before this appeal was filed in this court. To this answer appellant appeared and demurred. Counsel for appellant argue that the answer in question is not allowable under our practice, but to this we do not agree. A special answer to the assignment of errors is affirmative, and in the nature of an answer in the trial court in confession and avoidance. It does not controvert the assignment of errors, but avers facts showing that it has ceased to be effective. A special plea is always required where matters have occurred since the appeal was taken which render the attack upon the judgment of the trial court unavailing. In general it pleads matters which occurred after the judgment below was entered. Elliott, App. Prac. § 407, 408; Newman v. Kiser, 128 Ind. 258, 26 N. E. 1006; Union Tr. Co. v. Basey, 164 Ind. 249, 250, 73 N. E. 263.

[12] Appellant sought and obtained from the United States Circuit Court a decision of the question of its rights to have the cause removed before this appeal was filed. That decision was adverse to it, and eliminated any federal question from this appeal. A state court cannot be held to have decided against a federal right when it is the federal court which has denied its possession. The question of its jurisdiction was one for the federal court to settle, and, having done so, this court cannot review its decision, and determine the question adversely if it would. Chesapeake, etc., Ry. Co. v. McCabe, Adm'r, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; Missouri, etc., Ry. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536; Stockley v. Cissna, 119 Tenn. 135, 104 S. W. 792; Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83; Feeney v. Wabash R. Co., 123 Mo. App. 420, 99 S. W. 478; Tilley v. Cobb, 56 Minn. 295, 57 N. W. 799; Pioneer, etc., Co. v. Peck, 20 Tex. Civ. App. 111, 49 S. W. 161.

[13] Another ground of error is asserted and argued by counsel in the admission in evidence over the objection of appellant

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of transcripts of the proceedings in the Fulton circuit court and the federal court in the former case. These transcripts were read to the court to show a former action and its dismissal and the identity of issue and parties preliminary to the introduction of the deposition of John W. Huffman, and for the purpose of qualifying it for admission in evidence. For this purpose they were admissible. It does not appear that the complaint which is now made that they were read in the presence of the jury was made in the court below, or that the presence of the jury was the basis of the objection made to the trial court. If appellant had objections to their being read to the court in the presence of the jury, it could have requested that the jury be sent out of the room. Nor is any harm to appellant evident from the fact that the jury heard the reading.

[14] The transcripts of the proceedings so introduced in evidence showed the disagreement of the jury in the trial of the former case. Upon objection being made, the court refused to permit one of the attorneys for appellant in his argument to the jury to comment on this fact, and complaint is made that this was error. The evidence in question having been admitted for the sole purpose of informing the court of the admissibility of the deposition was not a proper subject of comment in the argument to the jury.

[15] Complaint is also made of the alleged misconduct of one of the attorneys for appellee in argument to the jury. The record shows that the appellant excepted to a certain statement of the counsel which is set out, and asked the court to instruct the jury that it was not proper argument. The court told the jury that they were not to be influenced by the statement, and there the matter rested. So far as the record discloses, counsel for appellant were satisfied at the time with the court's action. If they were not, if they thought that the court had not been sufficiently severe and explicit in what it did, it was incumbent on them to make it known to the court then by some further objection or motion. No question is presented for review by this court. *Staser v. Hogan*, 120 Ind. 207, 222, 21 N. E. 911, 22 N. E. 990; *Lingquist v. State*, 153 Ind. 542, 545, 55 N. E. 426; *Vannatta v. Duffy*, 4 Ind. App. 168, 30 N. E. 807.

It is finally contended that the verdict is not sustained by the evidence. It is conceded that it is shown that Huffman's death was caused by his injuries. It is further conceded that the evidence as to the occurrences which brought about his injuries is conflicting, and that the question whether the verdict is supported by the evidence must be answered by the testimony of the deceased. This evidence not only proves every material allegation of the complaint with reference to the negligence of appellant and facts from which the jury was fully warranted in finding that

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appellee was free from contributory negligence, but it made a stronger case than that alleged; and from what was said in determining the objections to the complaint the conclusion must follow that the evidence is sufficient to sustain the verdict. We find none of appellant's claims of reversible error sustained.

[16] The verdict was returned on March 11, 1908, and the judgment was rendered thereon September 28, 1908, for the amount of the verdict, without any provision for interest. During the term in which the judgment was rendered, appellee filed a written motion to modify it, so that it should draw interest from the date of the return of the verdict. This motion was overruled, and appellee, having excepted to the ruling, has assigned the ruling as cross-error. Section 7951, Burns 1908, provides as follows: "Interest on judgments for money, hereafter rendered, shall be from the date of the return of the verdict or finding of the court, until the same shall be satisfied, at the rate per cent. agreed upon by the parties in the original contract, not exceeding six per cent.; and if there be no contract by the parties, at the rate of six dollars a year on one hundred dollars." By the force of the provisions of this statute appellee was entitled to interest on the amount awarded her by the verdict, judgment having been rendered in her favor for that sum, from the day the verdict was returned; and good practice would seem to require that the judgment should so provide. To prevent controversy, and to aid the clerk in the performance of his duties in the matter of entering satisfaction of the judgment in such cases, the judgment should be for the sum awarded, together with interest thereon at the rate of 6 per centum per annum from the specified date of the return of the verdict until the judgment shall be satisfied. *Myers v. Jarbol*, 56 Ind. 57, 60; *Salem-Bedford Stone Co. v. Hobbs*, 27 Ind. App. 604, page 670, 61 N. E. 956. See, also, *New York, etc., R. Co. v. Roper*, 96 N. E. 468.

But the overruling of the motion to modify the judgment could not have harmed appellee, for the statute reads into such a judgment the right to collect interest thereon from the date of the verdict, and appellee was entitled to it notwithstanding the judgment by its terms did not provide for it.

Judgment affirmed.

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(Supreme Court of Missouri, Jan. 2, 1912. Rehearing Denied Jan. 27, 1912.)

[143 S. W. Rep. 785.]

Sunday—Statutes—Purpose.—The Missouri Sunday laws have regard to that day as a day of rest, and not as to its religious character.

Sunday—Statutes—Rule of Construction—Works of "Necessity."—The word "necessity" in Rev. St. 1899, § 2240, prohibiting labor on Sunday, excepting works of necessity, should be construed reasonably and neither too literally nor too liberally.

Sunday—Labor—Works of "Necessity."—Under Rev. St. 1899, § 2240, prohibiting labor on Sunday, but excepting works of "necessity," a physical and absolute necessity is not required, but it is sufficient if there is a moral fitness or propriety in doing the work on that day, under the circumstances of the particular case.

Sunday—Labor—Works of "Necessity."—Under Rev. St. 1899, § 2240, prohibiting labor on Sunday, but excepting works of necessity, carrying freight is a work of necessity.

Railroads—Train Service—Construction of Statutes—"Every Day."—The words "every day" in the act of March 19, 1907 (Laws 1907, p. 180), requiring all persons or corporations operating railroads to run at least one regular passenger train over all lines each way "every day," includes Sunday, since it is not unlawful for travelers to ride on a railway train on Sunday, nor for a railroad company to carry them on Sunday, and hence a railroad company that fails to run any trains over a line on Sunday is liable for the penalty prescribed for violation of the act.

Constitutional Law—Railroads—Civil Rights—Religious Liberty.—Act of March 19, 1907 (Laws 1907, p. 180), so construed as to require the running of at least one regular passenger train each way over all railroad lines on Sunday the same as on any other day, is not in violation of any provision of the state Constitution relating to religious liberty, since it does not prevent any one who wishes to observe that day as a day of worship from doing so.

Constitutional Law—Equal Protection of Laws—Regulation of Railroads.—Act of March 19, 1907 (Laws 1907, p. 180), requiring the running of at least one regular passenger train each way every day over all railroad lines, is not invalid on the ground that it is discriminatory, or that it denies to railroads the equal protection of the laws, since it applies equally to all railroads of the state.

Commerce—Interstate Commerce—Powers of State.—Act March 19, 1907 (Laws 1907, p. 180), requiring the running of at least one

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regular passenger train each way every day over all railroad lines, is not invalid as a regulation of interstate commerce.

Railroads—Regulation—Duty to Operate—Compelling Performance.—A railway company may be compelled by law to furnish trains for the carriage of passengers, and loss to the railroad is no defense to the enforcement of the law.

Lamm, Ferriss, and Graves, JJ., dissenting.

In Banc. Appeal from Circuit Court, Worth County; Wm. C. Ellison, Judge.

The Chicago, Burlington & Quincy Railroad Company was convicted of a violation of the act of March 19, 1907 (Laws 1907, p. 180), requiring railroads to run at least one train a day stopping at all stations, and it appeals. Affirmed.

Kelso & Kelso and *Spencer & Nelson*, for appellant.

Herbert S. Hadley, Atty. Gen., *Elliott W. Major*, Atty. Gen., *John Kennish*, Asst. Atty. Gen., and *F. G. Ferris*, Asst. Atty. Gen., for the State.

BOTSFORD, Special Judge. This cause comes by appeal from the Worth county circuit court. At the hearing here, one of the judges of this court, having been of counsel, did not sit, and the remaining six judges being equally divided in opinion, the special judge in the case was appointed. Const. of Mo., art. 6. § 11. The cause is resubmitted by the parties to the court thus constituted. The suit originated by a criminal information to recover a fine for the violation of a statute which was enacted in 1907 (Laws 1907, p. 180), and reads as follows:

“Be it enacted by the General Assembly of the state of Missouri, as follows:

“Section 1. That all persons, copartnerships, companies or corporations operating any railroad or part of a railroad in this state shall, unless hindered by wrecks or providential hindrance, run at least one regular passenger train each way every day over all lines, or part of a line, of railroad so operated by such person, copartnership, company or corporation in this state, which train shall stop at all regular stations along the line of such railroad for the purpose of receiving and discharging passengers.

“Sec. 2. Any person, copartnership, company or railroad corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. Approved March 19, 1907.”

The information charged defendant company with having failed to run a regular passenger train each way over its line of railroad between Grant City and Worth in said county on July 28, 1907, which day fell on Sunday, the first day of the week

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At the trial, a jury was waived and the cause submitted to and decided by the court on an agreed statement of facts, which were the same as the facts stated in the information. It appeals from the agreed statement that defendant had and has a railroad between Chariton, Iowa, and St. Joseph, Mo., through said Worth county, with said Grant City and Worth as regular stations, and that defendant habitually ran a regular passenger train each week day each way on its said line, but did not run, and failed and refused to run, any passenger train on said line on said Sunday. Both the information and agreed statement negatived that defendant was hindered from running passenger trains on said Sunday by wrecks or providential hindrance. The points made by the company where that Sunday was not included within said act of 1907, and that, if construed to include Sundays, said act was invalid under the Constitution of Missouri, and also that of the United States. The trial court overruled these points and gave a final judgment against the company finding it guilty and assessing a fine of \$100. Those points having been saved by proper exceptions and an overruled motion for a new trial, preserved in a bill of exceptions, are before us on defendant's appeal.

The first point, that Sunday is not included in the act by the use therein of the words "every day," depends for its solution on the question whether the running of trains, as enjoined by the act, is lawful on Sunday the same as on a week day. Sunday is a day of dual character. It is the Christian's day of worship; it is also the day of rest of men everywhere, irrespective of whether they have or have not a creed or a religious belief. The law does not deal with Sunday as a day of worship, but with it as a day of rest. The confusion of the two characteristics of the day has doubtless contributed to the large number of conflicting decisions by the courts.

[1] The Missouri Sunday laws have regard to that day as a day of rest, and not to the religious character of the day. They are civil, not religious, regulations, and are based upon a sound public policy which recognizes that rest one day in seven is for the general good of mankind. *Hennington v. Georgia*, 163 U. S. 299-304, 16 Sup. Ct. 1086, 41 L. Ed. 166. Those laws are sustained as civil, municipal, or police regulations, without reference to the fact that the day of rest is also the Christian's day of rest and worship. *State v. Ambs*, 20 Mo. 214; *State v. Graneman*, 132 Mo. 326, loc. cit. 331, 33 S. W. 784; *St. Louis v. De Lassus*, 205 Mo. 578, loc. cit. 585, 104 S. W. 12; *Swann v. Swann* (C. C.) 21 Fed. 299; 27 Am. & Eng. Ency. Law (2d Ed.) p. 388; *Lindenmuller v. People*, 33 Barb. (N. Y.), 548.

The decisions of our courts that Sunday is not included in the four days given for filing a motion for a new trial, are because at

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common law and under the statutes, with certain exceptions, judicial proceedings cannot take place on Sunday.

At common law, only judicial proceedings on Sunday were unlawful. 27 Am. & Eng. Ency. of Law, p. 389; *Merritt v. Earle*, 29 N. Y. 116, 86 Am. Dec. 292; *Pepin v. Baptiste*, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626; *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 669, 52 Am. St. Rep. 365; *Roberts v. Barnes*, 127 Mo. 415, 30 S. W. 113, 48 Am. St. Rep. 640. Labor and the making of contracts were not prohibited. *Swann v. Swann* (C. C.) 21 Fed. 299.

In the above case of *Swann v. Swann* (C. C.) 21 Fed. 299, which was a case decided in the United States Circuit Court for the Eastern District of Arkansas, the following propositions were adjudged, as appears from the syllabus of the case:

"3. Lord's Day Contracts—Valid in Tennessee, When.—In Tennessee isolated private contracts made on the Lord's Day, outside of the ordinary calling of the parties to them, are valid.

"4. Same—Arkansas Rule.—Prima facie contracts made in Arkansas on the Lord's Day are void; but contracts made in that state on that day between parties who observe as a day of rest any other day of the week, agreeably to the faith and practice of their church or society, are valid.

"5. Same—Common Law.—At the common law, contracts made on the Lord's Day were as valid as those made on any other day.

"6. Public Policy—How Ascertained.—The only authentic and admissible evidence of the public policy of a state, on any given subject, are its Constitution, laws, and judicial decisions.

"7. Lord's Day Acts—Police Regulations.—The Lord's Day acts are not religious regulations; they are a legitimate exercise of the police power, and are themselves police regulations."

The opinion in the case is by Judge Caldwell. That contains a full citation of the authorities, English and American, and an extended consideration of the subject.

Missouri has had a legislative policy on the subject of Sunday laws for 85 years. That policy first found expression in the Missouri Revised Statutes of 1825, and has continued through all the revisions since then until now. The Sunday laws of this state as they appeared in the first Revised Statutes of Missouri in 1825, and which may be found at pages 310 and 311 thereof, and which were approved February 11, 1825, read as follows:

"Sec. 90. Be it further enacted, that if any person on the Lord's Day, Sabbath or Sunday, shall be found laboring, or shall compel his or her apprentice, servant or slave, or the apprentice, servant or slave of any other person, to labor or perform other services, unless it be the ordinary household offices of daily necessity and charity, or other works of necessity or charity, he,

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she, or they, so offending, shall, on conviction, forfeit and pay the sum of one dollar for every offense, deeming every apprentice, servant or slave so compelled, as constituting a distinct offense: Provided, that no person who is a member of any religious society, who observes as a Sabbath any other day than the Christian Sabbath, shall be liable to the penalty herein incurred for a breach of the Sabbath, so that they observe one day in seven, agreeable to the regulations aforesaid, saving to ferry-men the right of crossing passengers.

“Sec. 91. Be it further enacted, that if any white person shall be guilty of shooting, horse racing, cock fighting, hunting, or of frequenting tippling houses or groceries, on the first day of the week, called Sunday, he shall, on conviction, be fined not less than one, nor more than ten dollars: Provided, however, that this section shall not extend to any person or persons, who may hunt, shoot or kill any wolf, panther, wild cat or other animal or fowl, which may in any way depredate upon or destroy any tame stock, growth or grain.

“Sec. 92. Be it further enacted, that if any person shall expose to sale any wares, merchandise, goods or chattels, or shall keep open any ale, or porter house or grocery, or shall retail any ale or porter, or any strong or spirituous liquors, after ten o'clock in the morning, on the first day of the week, called Sunday, every person, so offending, shall, on conviction, be fined not less than one nor more than ten dollars: Provided, that this section shall not extend to the sale of articles of provision, nor to the sale of any article of immediate necessity.”

The same statutes, couched in different phraseology, as contained in the revision of 1899, and which appear at pages 623 and 624 of volume 1 of the Revised Statutes of Missouri of 1899, read as follows:

“Sec. 2240. Sabbath Breaking.—Every person who shall either labor himself, or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.

“Sec. 2241. Last Section Construed.—The last section shall not extend to any person who is a member of a religious society by whom any other than the first day of the week is observed as a Sabbath, so that he observes such Sabbath; nor to prohibit any ferryman from crossing passengers on any day of the week; nor shall said last section be extended or construed to be an excuse or defense in any suit for the recovery of damages or penalties from any person, company or corporation voluntarily

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contracting or engaging in business on Sunday. (R. S. 1889, § 3853.)

"Sec. 2242. Horse Racing, Etc., on Sunday.—Every person who shall be convicted of horse racing, cock fighting or playing at cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars. (R. S. 1889, § 3854m.)

"Sec. 2243. Selling Goods on Sunday.—Every person who shall expose to sale any goods, wares or merchandise, or shall keep open any ale or porter house, grocery or tippling shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars. (R. S. 1889, § 3855n.)"

[2] These statutes exempt from their operation "works of necessity and charity." Those words are to be found in like statutes of many of our sister states. The meaning of the word "necessity" has been the subject of controversy in a large number of the conflicting decisions on this subject. That word should be construed reasonably and neither too literally nor liberally.

[3] By the word "necessity" in the Sunday law we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done under the circumstances of the particular case may well be deemed a necessity within the statute. *State v. Schatt*, 128 Mo. App. 622-636, 107 S. W. 10; *Burnett v. Telegraph Co.*, 39 Mo. App., loc. cit. 611. See, also, to the same effect, the remarks of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, as to the meaning of the word "necessary" in the Constitution of the United States. See, also, *Yonoski v. State*, 79 Ind. 393, 41 Am. Rep. 614; *State v. Collett*, 72 Ark. 167, 79 S. W. 791, 64 L. R. A. 204.

Again, in section 90 of the Revised Statutes of 1825, appears at the end of the section the words, "saving to ferrymen the right of crossing passengers," and language of like meaning has appeared in every succeeding revision. In 1825, when the statute with those words was first passed, ferryboats and steamboats on the rivers performed the functions since assumed by the railroads, which then had no existence in the state. In the days of steamboat traffic, nothing was more common than the running of those boats on Sunday the same as on week days. Now in their place we have railroads, and in place of ferryboats we have bridges across the Mississippi, Missouri, Osage, Kaw, and other rivers. Can there be any doubt but that in early times the running of both ferryboats and river vessels was lawful, even without the saving clause in the law of 1825?

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Neither the carrying of freight nor passengers by a common carrier, whether it be by a steamboat or a railway train, on Sunday, is forbidden by the common law, and if not forbidden by statute is as lawful on Sunday as on a week day.

[4] Carrying freight on Sunday is a work of necessity. *R. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Powhatan Steamboat Co. v. Railroad Co.*, 24 How. 247, 16 L. Ed. 682. In the case of *Railroad v. Lehman*, 56 Md. 209, loc. cit. 228, 40 Am. Rep. 415, the facts were as follows: The railway company was sued by Lehman for delay in delivering Lehman's cattle too late to be sold on Monday morning in the market for which they were destined. The declaration of the plaintiff Lehman alleged that the cattle were received by defendant railway on July 28, 1878, which was Sunday, and that the cattle were detained by the railway company upon its road in Baltimore until about half past 12 a. m. of the morning of Monday, July 29, 1878. There was a demurrer by the railway company to the declaration, which was overruled in the trial court. Afterwards there was a trial resulting in a verdict and judgment against the railway company, which appealed. The Maryland Supreme Court, in deciding the case, adjudged the following propositions: "(4) That its obligation was to carry according to its public profession and the conveniences at its command. And if injury were sustained by reason of any neglect of this duty, or other wrongful act in the carrying and delivering of the cattle, the fact of their having been received to be carried, or having been carried on Sunday, could afford no excuse to the defendant or exoneration from liability. (5) That the carrying forward of the cattle by the defendant on Sunday was not illegal; it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute. (6) That, even upon the supposition that the plaintiffs were violating the law in having their cattle transported on a Sunday, the defendant could not avail itself of such infraction of the law by the plaintiffs as a defense to an action for the consequence of a wrong or negligence of its own." The case shows that in consequence of the delay in transit of the cattle they did not arrive in the market of their destination until Wednesday, July 31, 1878, instead of Monday, July 29, 1878. The court in its opinion, at page 228, uses the following language: "The carrying forward of the cattle by the defendant on Sunday was not illegal; it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute. And, that being the case, there is no ground for the excuse relied on by the defendant. *Powhatan Steamboat Co. v. Railroad Co.*, 24 How. 247-253, 16 L. Ed. 682; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221; *Flagg v. Millbury*, 4 Cush. (Mass.) 243. And, even upon the supposition that

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the plaintiffs were violating the law in having their cattle transported on a Sunday, it is well settled that the defendant could not avail itself of such infraction of the law by the plaintiffs as a defense to an action for the consequence of a wrong or negligence of its own. *Phil. & Wilm. & Balt. R. Co. v. Steamboat Co.*, 23 How. 209, 16 L. Ed. 433; *Mohney v. Cook*, 26 Pa. 342, 67 Am. Dec. 419; *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221. The court below was clearly right, therefore, in overruling the demurrer of the defendant to the declaration of the plaintiffs."

In the case of *Commonwealth v. Louisville & Nashville R. Co.*, 80 Ky. 291, 44 Am. Rep. 475, the Court of Appeals of Kentucky ruled that: "The running of its passenger trains by appellee upon its railroad, transporting passengers, baggage, etc., on the Sabbath day, is not a violation of section 10, art. 17, c. 29, General Statutes. Such use of its trains on that day held to be 'work of necessity.'" That was a proceeding in the name of the commonwealth against the railroad company under the Kentucky statute, which provides as follows: "No work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity. If any person, on the Sabbath day, shall himself be found at his own or any other trade or calling, or shall employ his apprentices or other persons in labor or other business, whether the same be for profit or amusement unless such as is permitted above, he shall be fined not less than two nor more than fifty dollars for each offense."

The petition in the case to recover the fine on the part of the commonwealth against the railroad company alleged that on Sunday, April 3, 1881, the company did run and operate over its railroad track, in the county of Jefferson, a certain train consisting of one locomotive engine, baggage car, and three several passenger coaches, and that said train was running and transporting, for the profit of the defendant, passengers and their baggage, merchandise, express packages, and the United States mail into the state of Kentucky for sundry points within the state, and through said state into other states. That for the purpose of operating said train the company did hire and employ certain persons to work and labor on the train as engineers, brakeman, and baggage-master, and for which labor they were paid their wages. And it was further alleged that such work was not a work of necessity or charity. In the opinion in the case, the court said:

"The sole power of determining the policy of such an enactment as is brought in question is vested in the legislative department of the state government by the Constitution, and, unless the passage of this Sunday law, as it is usually termed, is inhibited by some provision of that instrument, it must be sustained. The

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legislative will is supreme on all such questions, and, when not abridging the civil rights or privileges of the citizen, must be held to be constitutional. The constitutionality of similar enactments has been passed on and sustained by courts of last resort in nearly every state of the Union, and this concurrence of opinion, together with a reference to former decisions of this court on kindred subjects, conclude, in our opinion, the constitutional question raised, and we will discuss the application of the statute alone to the acts of this company, entertaining no doubt as to the constitutionality of the law.

“The meaning to be attached to the words ‘or other work of necessity,’ found in the act, must control the decision of this case, and if we are to attach to those words their scientific or physical meaning—that is, that the action of the company was inevitable or could not have been otherwise—its liability would at once be fixed, as it might have stopped its trains or declined to receive freight or passengers unless upon the agreement that the delay in transportation should relieve it from responsibility. Under such a ruling the cooking of food or the feeding of stock on the Sabbath might be dispensed with, and every other necessity in the way of labor that was not indispensable to man’s existence.

“Could this have been the legislative intent when using such language in the statute, or shall we not interpret the words as having a legal meaning designed to apply to the wants of the citizen, adapting the language in its construction to the manners, habits, wants, and customs of the people it is to affect; and, in many cases, the rights and duties of those charged with a public or private duty, and the obligations they are under to others, must also be considered in determining the character of labor falling within the statutory prohibition. It is argued in the case of *Sparhawk v. Union Passenger Railway Company*, reported in 54 Pa. 401, that it was not intended by such acts to exempt the party charged from the prohibition of the statute because his labor was a work of necessity to others, but it must be a work of necessity to him who does the labor. We do not so construe the statute. If so, why protect the apothecary who sells his medicines for the relief of the patient, or the dairyman who furnishes milk for his customers, or the hotel keeper who furnishes his guests with food and lodging? It is the exigencies of the object to be accomplished that determines, to a great extent, the means to be resorted to for that purpose. No safer rule, we think, can be established, or any better definition given of the word ‘necessity,’ than is found in the decision cited as adverse to the views therein expressed, and that is: ‘The law regards that as necessary which the common sense of the country, in its ordinary mode of doing business, regards as necessary.’ The change in the habits and customs of the people, and the mode and character of transportation and travel, makes that a necessity at this day that half a century since would not have been so regarded.

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“It is impossible, and certainly not practicable, to draw the line of distinction with certainty between works of necessity and such labor as falls within the denunciation of the statute, and we are not disposed to venture so far as to attempt to place a limit to the meaning of the word ‘necessity’ when applied to the wants of man. In the case of McGatrick against Wasson, reported in 4 Ohio St. 566, it was held ‘that works of necessity are not limited to the preservation of life, health, or property from impending danger. The necessity may grow out of, or indeed be incident to, the general course of business, or even be an exigency of a particular trade or business, and yet be within the exemption of the act. Hence the danger of navigation being closed may make it lawful to load a vessel on Sunday, if there is no other time to do so.’

“In the case of the Phil. & Balt. Railroad Co. against Steam Towboat, reported in 23 How., 16 L. Ed., the court said: ‘We have shown, in our opinion delivered at this term, that in other Christian countries, where the observance of Sundays and other holidays is enforced by both church and state, the sailing of vessels engaged in commerce, and even their lading and unlading, were classed among the works of necessity which are excepted from the operation of such laws. This may be said to be confirmed by the usage of all nations, so far at least as it concerns commencing a voyage on that day.’

“Railroad companies, as carriers of passengers, furnish at this day almost every accommodation to the traveler that is to be found in the hotels of the country. His meals, as well as sleeping apartments, are often furnished him, and to require the train, when on its line of travel, to delay its journey that the passenger may go to a hotel to enjoy the Sabbath, where the same labor is required to be performed for him as upon the train, or to require him to remain on the train and there live as he would at the hotel, would certainly not carry out the purpose of the law, and, besides, the necessity for reaching his home or place of destination must necessarily exist in so many instances as to make it indispensable that the train should pursue its way. So of the trains transporting goods, merchandise, live stock, fruits, vegetables, etc., that, by reason of delay, would work great injury to parties interested. A private carriage, in which is the owner or his family, driven by one who is employed by the month or the year to the church in which the owner worships, or to the home of his friend or relative, on the Sabbath, is not in violation of the statute. So in reference to the use of street railroads in towns and cities on the Sabbath day. Those who have not the means of providing their own horses or carriages travel upon street cars to their place of worship, or to visit their friends and acquaintances; and such is the apparent necessity in all such cases, that no inquiry will be directed as to the business or destination of the traveler, whether

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in the one case or the other; nor will an inquiry be directed as to the character of the freight being transported; nor will the person desiring to hire the horse from the livery stable be compelled to disclose the purpose in view in order to protect the keeper from the penalty of the law. Such employments are necessary, and not within the inhibition of the statute."

It has been held that the rule as to judicial proceedings had on Sunday should not be unduly extended. In the case of *Pepin v. Société St. Jean Baptiste*, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626, it was decided by the Supreme Court of Rhode Island that: "A benefit association whose object is not profit, but to relieve members and their families in case of sickness and death, is a charitable organization, and the transaction of its business is a work of necessity and charity, and can be done on Sunday."

That was a suit by mandamus, brought by a member of a benefit society who had been excluded therefrom by an order of the society made on Sunday. There was a demurrer by the society to the petition for the mandamus, and, in discussing the demurrer, the court in its opinion used the following language: "Another ground for demurrer is that, as the hearing and expulsion took place on Sunday, it was illegal and void. It was a rule of the common law that Sunday is a nonjudicial day, and many cases have held that a judgment entered on Sunday was void. The petitioner argues that the trial in this case was an exercise of judicial power and therefore void. The cases relied on by him relate to judgments of courts, where it has been held, in some upon common-law authority and in some upon statutory provisions, that judgments so entered were void. We recognize the correctness of such decisions upon common-law authority, and also upon grounds of public policy and recognition of Christian practice. The present case, however, does not come within such grounds of prohibition. While there was a trial, the respondent was not a court of law, but a benevolent association, and its action was a part of the business of such a society. Such bodies are recognized as charitable organizations because their object is not individual profit, but a provision to relieve its members and their families in case of sickness and death. There was no rule at common law to forbid such societies to transact their business on Sunday. Possibly they are of too recent date to have been embraced in such a rule. As said by Savage, C. J., in *Story v. Elliot*, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423: 'By the common law, then, it appears all judicial proceedings are prohibited. All other acts are lawful unless prohibited by statute.' That case involved an award made on Sunday, and the court held it void as a judicial proceeding because arbitrators are not only jurors to determine facts, but judges to adjudicate as to the law; and their award, when fairly and legally made, is a judgment conclusive between the parties from which there is no appeal. Accepting the rule thus stated, we

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do not think that the action here complained of was a judicial proceeding in the sense in which the term was used at common law nor by the court in the opinion last cited. Evidently the courts of New York do not so regard it, for in *People ex rel. Corrigan v. Young Men's Society*, 65 Barb. (N. Y.) 357, it was held that a notice to answer charges served on Sunday, and a hearing, resulting in expulsion from a benevolent society, on the next Sunday, were not illegal because the papers were served and were returnable on Sunday, because they were not illegal at common law nor forbidden by statute. The court added: 'The relator chose to belong to a society which held all its regular meetings on that day, and if, at such a meeting, he was served with notice to attend the next meeting, it does not rest with him to make the objection.' In *McCabe v. Father Matthew Society*, 24 Hun. (N. Y.) 149, it was held that a resolution of suspension was not rendered invalid by the fact that it was adopted at a meeting held on Sunday, for the reason 'it is pure charity to relieve sick members, and the passage of such a resolution on Sunday would be unobjectionable.' In *Turnverein v. Carter*, 71 Mich. 608, 39 N. W. 851, under Comp. Laws, c. 55, § 1, like our laws in excepting works of necessity and charity, it was held that a resolution authorizing a mortgage by the society, passed on Sunday, was void because it was not a religious or charitable association; implying that a charitable association might have done so. No cases are cited by the petitioner, and we know of none, which hold that a society of this sort may not transact its business on Sunday. That which comes nearest to such a statement is *Society v. Commonwealth*, 52 Pa. 125, 91 Am. Dec. 139. The court sustained the expulsion of a member of a relief association for the sick, at a meeting held on Sunday, on the ground that the question of illegality for that cause was not before the court as one of the grounds of demurrer. The court added, by way of quære: 'It might be well to consider how far such trials on Sunday comport with the legislation of the state and the genius of our institutions.' The statute was similar to ours in excepting works of necessity and charity. We think that the necessary work of charitable organizations is within the intent and words of our statute. The petitioner argues against such a construction for the reason that he might not be able to compel the attendance of witnesses or the aid of counsel on Sunday. This consideration, however, is not raised by any facts set forth in the record. The attendance of witnesses before such a tribunal cannot be compelled at any time; but a lawyer appearing to defend might be regarded as doing work of his ordinary calling. If either witnesses or counsel should be unwilling to attend on Sunday, or for any cause tending to deprive one of a fair trial, he should ask for a reasonable postponement on that account, and should it be refused, there would be strong reason for holding such an expulsion to be illegal. But no such facts appear in this

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case. We decide that the demurrer to the answer cannot be sustained upon the grounds stated."

In the case of *Western Union Telegraph Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113, it was held that the sending of a telegraph message on Sunday, addressed to a doctor, notifying him that the sender's daughter was ill and asking him to come at once, was reasonably necessary under the law of Indiana.

Suppose a person living at Grant City, Mo., should early Sunday morning receive a telegram of the death of a relative at St. Joseph, Mo., the previous midnight. The sending and delivering of the telegram would be lawful. How could it be affirmed that the taking of the next train on Sunday to St. Joseph would be unlawful? And if, in the Indiana case cited above, it was lawful to telegraph on Sunday for a doctor to come to attend a sick person on Sunday, was it not also lawful for the doctor to ride on the next train in answer to the call?

In the case of *Western Union Telegraph Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23, it was held that: "The notification to a person of the death of his father and a request to attend the funeral involved such a moral necessity that a contract to send a telegraphic message for that purpose is valid, though made on Sunday." In the opinion in that case, the court said: "We cannot doubt but that the emergency of the death and burial of one's father involves such moral necessity for his presence before and at the funeral as brings a contract, made to that end on Sunday, within the exception of cases of necessity made by our statute, if, indeed, such contracts would not also be within the exception in favor of works of charity, in a liberal sense of that term. Code [1886] § 1749; *Burns v. Moore*, 76 Ala. 339 [52 Am. Rep. 332]; *Railway Co. v. Levy*, 59 Tex. 542 [46 Am. Rep. 269]; *Doyle v. Railroad Co.*, 118 Mass. 195 [19 Am. Rep. 431]."

In the case of *State v. Collett*, 72 Ark. 167, 79 S. W. 791, 64 L. R. A. 204, it was held that, where a belt in a mill employing 200 persons broke on Saturday through an unexpected defect, and could not be repaired that day because gasoline could not be procured in a town of 3,000 inhabitants, the repairing of it Sunday morning, without which the mill would have to be shut down Monday, as after the belt was glued it had to dry 18 hours before it could be used, was a work of necessity within the meaning of the Sunday law of Arkansas.

Suppose there were a like mill at Albany, Mo., and an accident happened to it too late Saturday evening to be repaired that day. Would it be unlawful to use defendant's passenger and freight trains which run between that city and St. Joseph Sundays the same as on other days to obtain the necessary repairs so as to resume work on Monday?

It is a well-known fact that Monday morning is the best time

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in the week to market live stock shipped to Chicago, St. Louis, Kansas City, St. Joseph, or Omaha; but if a train of live stock loaded up in Texas for one of those markets must, under the act of Congress, stop for rest, water, and feed of the cattle after being out 28 hours, must the train also remain on a switch or side track over Sunday?

In the case of the City of Topeka *v.* Hempstead, 58 Kan. 328, 49 Pac. 87, it was held that: "The delivery of milk to his customers by a dairyman is a work of necessity, and not within the inhibition of the law forbidding any labor on Sunday other than works of necessity or charity."

Suppose the electric lighting, gas heating, hotel, and street railway companies of the large cities of this state were to refuse to perform their public duties on Sunday by closing down that day, on the ground that the performance of those duties that day is unlawful, would such a refusal or contention be sustained?

In the case of Sullivan *v.* R. Co., 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427, it was held that: "Riding upon Sunday for exercise, and for no other purpose, is not a violation of the Maine Sunday statute." In the opinion, in that case the court uses the following language: "The defendant's contention in support of the single question raised by the exception is founded upon the erroneous assumption that riding upon Sunday for exercise, and for no other purpose, is a violation of the statute in relation to the observance of the Lord's Day. The statute is not to be so construed. Such an interpretation would be contrary to the spirit as well as the letter of a statute which expressly excepts from its prohibition works of necessity or charity. Rev. St. c. 124, § 20. And this exception may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath. Tested by this rule, our own court, in O'Connell *v.* Lewiston, 65 Me. 34 [20 Am. Rep. 673], and Davidson *v.* Portland, 69 Me. 116 [31 Am. Rep. 253], has held that walking out in the open air upon the Sabbath for exercise is not a violation of the statute. In other jurisdictions, also, it has been held to be not unlawful to ride to a funeral (Horne *v.* Meakin, 115 Mass. 326); walking to prepare medicine for a sick sister (Cronan *v.* Boston, 136 Mass. 384); traveling to visit a sick friend (Doyle *v.* Railroad Co., 118 Mass. 195 [19 Am. Rep. 431]); a servant riding to prepare needful food for her employer (King *v.* Savage, 121 Mass. 303); a father riding to visit his two boys (McClary *v.* Lowell, 44 Vt. 116 [8 Am. Rep. 366]); walking for exercise (Hamilton *v.* Boston, 14 Allen [Mass.] 475); and walking partly for exercise and partly to make a social call (Barker *v.* Worcester, 139 Mass. 74 [29 N. E. 474])."

In the case of Louisville & Nashville R. R. Co. *v.* Commonwealth, 30 S. W. 878, the state of Kentucky sued the railway company to recover a penalty for running an excursion train on

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Sunday. From a judgment in the trial court against the company, that company appealed to the Kentucky Court of Appeals where the judgment of the trial court was reversed and the cause remanded with directions to sustain a demurrer to the petition in the case. There seems to have been two cases and the appeals were decided together. In the opinion in the case, the court said: "These two cases involve the same questions and were heard together. These appeals are prosecuted from judgments of the Taylor circuit court rendered in suits of the commonwealth of Kentucky against appellant, instituted to recover the penalty prescribed by section 10, art. 17, c. 29, Gen. St., which provides that no work or business shall be done on the Sabbath day except the ordinary household offices or other work of necessity or charity, and provides a fine of \$2 to \$50 for each offense. Appellant filed its demurrer in each of these cases, which was overruled, and a trial resulted in a judgment against appellant in each case for \$300. From these judgments appellant has appealed, and insists that no cause of action was stated in the petition. The petitions alleged, in substance, that the appellant, being a railroad corporation, did, on the Sabbath day, run and operate a train of cars on its railroad in Taylor county, through the county to Louisville, by way of Lebanon, and that said train did not carry freight nor United States mail; that no regular trains were run on said road on the Sabbath day. The allegations of the petition show that the train was an excursion train, and that a lower rate of fare was charged than on regular trains. The question presented for consideration is, Was the running of said train a work of necessity? Appellant refers to the case of the commonwealth against the appellant, decided by this court at its May term, 1882, in which the meaning and proper construction of the statute under consideration was discussed at length, and in that case it was decided that the running of regular trains by appellant on Sunday was a work of necessity. See [Commonwealth v. Louisville & Nashville R. Co.] 80 Ky. 292 [44 Am. Rep. 475]. It seems that, if trains can be lawfully run and operated on every Sabbath day for any and all purposes, an excursion train may be lawfully run when deemed necessary. It also seems that after the decision, *supra*, was rendered the Legislature adopted the views therein announced, and section 1321 of the Kentucky Statutes permits the running of steam railroads on Sunday. It seems to us that the petition in these cases fails to show a right to recover, and the demurrer thereto should have been sustained. The judgment in each case is therefore reversed, and causes remanded, with directions to sustain the demurrers, and for further proceedings consistent with this opinion."

In the case of *Doyle v. R. Co.*, 118 Mass. 195, 19 Am. Rep. 431, it appears that the plaintiff had ridden in one of defendant's

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railway cars from Lynn to Boston on Sunday for the purpose of visiting a sick friend whom he thought might need assistance and for the purpose of rendering such assistance as he might find necessary, and the Supreme Court of Massachusetts held that such travel was lawful.

In the case of *Murray v. Commonwealth*, 24 Pa. 270, the Supreme Court of Pennsylvania adjudged the following propositions: "(1) A lockkeeper in the employ of the Schuylkill Navigation Company is not liable to conviction for violating the act of 22d April, 1794 [3 Smith's Laws, p. 177], prohibiting worldly employment on Sunday, for opening the lockgates on the Schuylkill canal to admit the passage of boats on the Sabbath day, on the demand of owners or captains of boats navigating the canal. (2) The Schuylkill river is a public highway, and, as people have a right for some purposes to pass along it even on Sunday, the company must keep it open; and the agents of the company are not to judge as to the lawfulness of the travel, which is done at the risk of incurring the penalty prescribed for the violation of Sunday, inflicted in the mode prescribed by law."

That was a case where Murray was charged with having violated the law prohibiting worldly employment on the Lord's Day. The act of Murray, the defendant, consisted in opening the lockgates of the Schuylkill canal on Sunday to admit of the passage of boats, upon the demand of their owners or captains engaged in navigating the canal. The legality of the conviction of the defendant Murray was the sole question for decision in the Supreme Court. In the opinion in the case, Lowrie, J., said: "The Schuylkill river is a public highway, and, as people are not forbidden by law, and therefore have a right, for some purposes, to pass along it, even on the Lord's Day, the Navigation Company must keep it open, and, for this purpose, must have lockkeepers to act for them. There may, indeed, be unlawful travel on Sunday, and for such travel there can be no right to have the locks opened; but the criminality of the lockkeepers is not proved by the criminality of the travel because, as agent of the company, he is bound to keep the navigation open for travel, and is not made the judge of its rightness. Every man travels at his own risk on Sunday, and that risk is measured legally only by the legal penalty. To stop him would be the imposition of a different penalty, tenfold more serious perhaps, and it is not the remedy of the law. Besides this, the law would not impose upon the lockkeeper the authority to judge of the rightness of the travel without investing him with the exemption from liability for misjudgment that ordinarily belongs to judicial officers, and then the traveler would be without remedy in case of his error of judgment, and would be justified in going on in case of a decision in his favor. This would make a lockkeeper, in this respect, a more important public officer than a justice of the peace."

We have seen from the foregoing considerations and citations

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that, viewed from the standpoint of labor, much of the travel on Sunday on the railways are works of "necessity," within the meaning of our laws, and the opinion of Mr. Justice Lowrie in the case last cited is a precise authority, emanating from a great judge, to the effect that no common carrier can make itself a judge or magistrate of the law to determine whether any of its passengers, riding on Sunday, is riding under circumstances which make him a violater of law, or not.

Thus far I have proceeded upon the theory that traveling is labor, not rest. The statutes of the different states forbid labor, not rest. Suppose a family goes to church Sunday morning in an automobile. Is their so going labor or rest? If they go out in the same way 50 miles or more the same afternoon, is that labor or rest? If instead of their riding in a carriage or automobile, guided either by one of the family or by an employed driver or chauffeur, they ride in the same way Sunday morning and afternoon in a street car, or a suburban trolley line, is that labor or rest? If a person stays all day Sunday at a hotel, is that labor, or is it rest? And if he, instead of staying at a hotel, obtains the same accommodations on a moving train of cars, is that labor or rest? Riding on a train of cars on Sunday may or may not be worship, but I am of opinion that the citizen may observe Sunday as a rest day, in any manner he chooses to rest; that he may do so either in his private vehicle, or in a conveyance of a common carrier, or at a hotel, or at his home; and that he does not thereby infringe either upon any of our own statutes or upon the policy of the state, as evidenced thereby.

[5] It follows that traveling on Sunday on the trains of railways is not unlawful, and that the words "every day" in the act of 1907 under consideration include Sundays with the other days of the week. Even if said act in so including Sunday had changed the legislative policy of the state, or had repealed or modified by implication any former statute, the result would be the same. And here we are brought to the point that the act of 1907, so construed as to include Sunday, is violative of the state Constitution. Here it should be noted that, while the federal Constitution is a grant of enumerated powers, a state Constitution is a body of limitations on the powers of the Legislature and the other departments of the state government. Cooley's Con. Limitations (17th Ed.) 126.

What is there in our state Constitution prohibitive of the act of 1907 in question? The following are the sections of our state Constitution respecting the subject of religion. Sections 5, 6, 7, and 8 of article 2 of the Missouri Constitution read as follows:

"Sec. 5. Religious Freedom—Belief not to Affect Citizen—Liberty of Conscience.—That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; that no person can, on account of his

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religious opinions, be rendered ineligible to any office of trust or profit under this state, nor be disqualified from testifying, or from service as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought, by any law, to be molested in his person or estate, on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of this state, or with the rights of others.

"Sec. 6. Religion, Individual Support of, Not Compulsory.—That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

"Sec. 7. Religion—State Must not Aid Church.—That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed or religion, or any form of religion, faith or worship.

"Sec. 8. Religious Corporation may be Established for One Purpose Only.—That no religious corporation can be established in this state, except such as may be created under a general law for the purpose only of holding the title of such real estate as may be prescribed by law for church edifices, parsonages and cemeteries."

Also section 11 of article 11 of the same Constitution:

"Sec. 11. Religious or Sectarian Schools—Public Funds not to be Paid or Properly Granted to.—Neither the General Assembly nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever made by the state, or any county, city, town or other municipal corporation, for any religious creed, church or sectarian purpose whatever."

[6] None of these provisions of the Constitution are violated by the act of 1907 in question. The employees of the company voluntarily do the lawful work of running its trains on Sunday, and their rights to worship "according to the dictates of their own conscience" are in no wise restrained or denied. Any em-

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ployee may accept or refuse employment on Sunday; he may remain at home, or he may attend worship at a church. There is no more compulsion in his service on Sunday than on a week day, and it is not shown, if, indeed, it could be shown, that there is any more difficulty in a railroad company employing trainmen for their Sunday trains than for a druggist, hotel keeper, street car company, telegraph company, telephone company, gas company, or other public service company to hire clerks and other employees for their service on the same day. It is not shown, if, indeed, it could be shown, that railway employees act otherwise than voluntarily in their Sunday work, and, the employee having exercised a lawful choice freely and voluntarily, I think the company cannot vicariously claim the right to make a different choice for the employee than the one he makes for himself. *St. Louis v. Shields*, 52 Mo. 351. Nor is the act of 1907 violative of the Missouri Constitution because of the words of its preamble which express that "with profound reverence for the Supreme Ruler of the Universe and grateful for his goodness," the people "establish this Constitution." If this clause means that all men must observe Sunday, not only as a day of rest but also as a day of worship, then the preamble violates section 6 of article 2 above cited, and, as a consequence, an established religion by the state follows.

The act of 1907 does not do any violence to Sunday considered as a day of rest, and does not violate the policy of the state or any provisions of the Constitution. If the act had either denied, aided, or commanded the observance of the day as a day of worship, such provision would, in my opinion, be contrary to the Constitution. Nor is the act open to the objection of class legislation.

[7] The law is valid although applicable alone to railroads. *Humes v. R. R.*, 82 Mo. 221-223, 52 Am. Rep. 369; *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483, 10 L. R. A. (N. S.) 601, 120 Am. St. Rep. 671; *R. R. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *R. R. v. Bristol*, 151 U. S., loc. cit. 571, 14 Sup. Ct. 437, 38 L. Ed. 269; *R. R. Co. v. North Car. Cor. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933.

The act contains no element of unjust discrimination and no denial of the equal protection of the laws, it being alike applicable to all the railroads of the state. *R. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269.

[8] Nor does the act operate as a regulation of interstate commerce. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; *R. R. Co. v. Ohio*, 173 U. S. 285-306, 19 Sup. Ct. 465, 43 L. Ed. 702. On the contrary, the act is an aid to interstate commerce rather than a hindrance or burden.

[9] A railway company may be compelled by law to furnish trains for the carriage of passengers. *Com. v. Ry. Co.*, 120 Ky.

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91, 85 S. W. 712; *People v. R. R.*, 70 N. Y. 569. And loss to a railroad is no defense to a petition for a mandamus to compel obedience to such a law. *State v. R. Co.*, 83 Mo. 144, 150; *R. R. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *R. R. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *R. R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933. And, if the Legislature may compel railroad companies to perform their duties to the public by running passenger trains on week days, and if, as I hold, they owe the public the same duties of service on Sundays as on week days, then it follows that the act of 1907, commanding such performance and providing penalties for refusals to obey, is constitutional and valid. I think the judgment should be affirmed, and it is so ordered.

VALLIANT, C. J., and WOODSON and BROWN, JJ., concur. WOODSON, J., files separate concurring opinion. LAMM, FERRISS, and GRAVES, JJ., dissent in an opinion by LAMM, J. KENNISH, J., having been of counsel, did not sit.

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Administrator of person killed while traveling on railroad train could recover under statute in question though his intestate was not in exercise of due care, provided he was a passenger. *Renaud v. New York, etc., R. Co. (Mass.)*, 632.

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In action against carrier for breach of its contract of transportation and its threat to eject plaintiff, a woman, from the train, damages for the humiliation suffered are recoverable; and an award of \$750 therefor was not excessive. *Illinois Cent. R. Co. v. Fleming (Ky.)*, 252.

Measure of damages for ejection of passenger from train at point other than a usual stopping place. *St. Louis, etc., Ry. Co. v. Williams (Ark.)*, 41.

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\$250 punitive damages was justified, where conductor drew aside the curtain of passenger's berth, put his lantern in her face, and told her that her ticket was not good and that she would have to pay fare. *Illinois Cent. R. Co. v. Fleming (Ky.)*, 252.

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Degree of Care.

Carrier must exercise highest degree of care for safety of its passengers, and is liable for slightest negligence. *Lake Erie R. Co. v. Huffman (Ind.)*, 766.

Carrier of passengers are not insurers, but exercise highest practical degree of human skill to carry passengers in safety. *Thorson v. Groton, etc., Ry. Co. (Conn.)*, 592.

Common carrier of passengers must exercise highest degree of skill and care to prevent injury, though it is not an insurer. *Southern Ry. Co. v. Brooks (Tenn.)*, 608.

Required of motorman to protect passenger from danger incident to presence of the car's electric apparatus in vestibule. *Martin v. Old Colony St. Ry. Co. (Mass.)*, 268.

Street railway is bound to exercise due care in transporting passengers. *Webber v. Old Colony St. Ry. Co. (Mass.)*, 615.

Street railway is bound to exercise toward its passengers the highest degree of care consistent with the successful operation of its business. *Austin v. Washington Water Power Co. (Wash.)*, 245.

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Duty to Transport.

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Though carrier was entitled to remove body of child, accidentally killed, from train, the ejection of his mother and her other children was without justification. *Leek v. Northern Pac. Ry. Co.* (Wash.), 36.

Evidence.

Custom to stop street cars at point in question to permit passengers to alight or board car was relevant to sustain passenger's contention, though, standing alone, it did not prove that the car stopped there at time of accident. *Norfolk & A. Term. Co. v. Rotolo* (C. C. A.), 259.

Evidence of subsequent precautions. *Martin v. Old Colony St. R. Co.* (Mass.), 268.

Evidence was insufficient to show that passenger contracted pneumonia in Pullman car through insufficient heating. *Marcott v. Minneapolis, etc., Ry. Co.* (Wis.), 44.

False Imprisonment.

Carrier is responsible for conduct of its brakeman and station agent who assisted conductor in wrongfully ejecting passenger, and restraining him of his liberty. *Hull v. Boston & M. R. R.* (Mass.), 15.

Where, in action by passenger for assault and false imprisonment, the answer was general denial, defense that acts complained of were justified under Mass. Rev. Laws, c. 108, § 18, authorizing arrest of passenger refusing to pay fare, was not available. *Hull v. Boston & M. R. R.* (Mass.), 15.

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Heating of car, liability of carrier for injury to passenger from insufficient. *Marcott v. Minneapolis, etc., Ry. Co. (Wis.)*, 44.

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Intoxicated Passengers.

Care due from trainmen to intoxicated passenger. *Winfrey v. Missouri, K. & T. Ry. Co. (C. C. A.)*, 228.

Decedent was not so intoxicated that he could not take care of himself or realize danger of his position on car steps, and his falling from the steps was due to his own negligence in failing to see switch target which struck him. *Paris & G. R. Co. v. Robinson (Tex.)*, 24.

Right of carrier to assume that intoxicated passenger knew of danger of going upon car steps, and would use reasonable care to protect himself from injury. *Paris & G. N. R. Co. v. Robinson (Tex.)*, 24.

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Question for jury whether street car passenger was thrown against end of car by reason of its excessive speed while going around curve. *Austin v. Washington Water Power Co. (Wash.)*, 245.

Railroad company will not be liable for even serious injuries to passengers from being jolted by sudden stopping of train to prevent killing or injuring trespassing persons or animals, when they are run down under such circumstances that it would endanger passengers to stop train. *Southern Ry. Co. v. Brooks (Tenn.)*, 608.

Presumption of Negligence.

Jolt causing street car passenger to be lifted from her seat and fall. *Webber v. Old Colony St. Ry. Co. (Mass.)*, 615.

Mere coincidence of sudden lurch of street car and injury of person attempting to board it. *Wright v. Sioux Falls Traction System (S. Dak.)*, 618.

Mere proof of injury to passenger will not, at common law, sustain recovery against carrier. *Wright v. Sioux Falls Traction Co. (S. Dak.)*, 618.

Ventilator of street car falling upon passenger. *Thorson v. Groton, etc., Ry. Co. (Conn.)*, 592.

CARRIERS OF PASSENGERS—Continued.

Where passenger suing for injuries caused by her hand being caught between door and frame of car while alighting did not show any cause for the accident. *Cornette v. Baltimore & O. R. Co.* (C. C. A.), 221.

Protection of Passengers.

Carrier's duty to protect passenger from violence and annoyance from employees, fellow passengers, or strangers. *Hull v. Boston & M. R. R.* (Mass.), 15.

Proximate Cause.

Failure of trainmen to see that intoxicated passenger was safely removed from the train at his destination was not proximate cause of his being struck by train on other track; and in absence of evidence of failure of latter train to give statutory signals and keep a proper lookout there could be no recovery. *Winfrey v. Missouri, K. & T. Ry. Co.* (C. C. A.), 228.

Failure to stop the train at station was proximate cause of passenger's injury, his act in alighting from it while it was moving being only an incidental cause contributing to the injury, and induced by the carrier's negligent failure to stop. *Kansas City So. Ry. Co. v. Worthington* (Ark.), 573.

Receiving Passengers.

Carrier liable for negligently running another car against passenger while he was boarding street car and was on its lower step. *Norfolk & A. Term. Co. v. Rotolo* (C. C. A.), 259.

Carrier's duty to transport passengers is confined to those who are prepared to conduct themselves according to its valid regulations. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

Statute in question cannot be construed as requiring carrier to receive as passenger one who had been expelled for misconduct affording ground for ejection from train which he is seeking to re-enter. *Phillips v. Atlantic C. L. R. Co.* (S. Car.), 566.

Rules and Regulations.

Carrier's right to establish and enforce reasonable regulations for its own protection in management of its business. *Hull v. Boston & M. R. R.* (Mass.), 15.

Carrier's right to make rules to govern conduct of passengers. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

Regulation of carrier must have been brought to passenger's knowledge, either expressly or by necessary implication. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

Right of carrier to enforce rule to prevent passenger who has willfully refused to pay his fare and provoked expulsion from re-entering the train from which he was expelled. *Phillips v. Atlantic C. L. R. Co.* (S. Car.) 566.

Right to forbid passengers to ride in baggage car, or on platform or steps of any car. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

Rule forbidding passengers to ride on car steps or platform was admissible on issue of gross negligence of engineers of both trains, where passenger, while standing on steps of car, was thrown from it by suction created by passage of another train at high speed. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

Rule forbidding passengers to ride on car steps was admissible in evidence, in action to recover statutory penalty for his death. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

CARRIERS OF PASSENGERS—Continued.**Statutes.**

Duty of railroad to safely carry its passengers is superior to requirements of statute in question, enacted for the protection of persons and animals on railroad tracks. *Southern Ry. Co. v. Brooks* (Tenn.), 608.

Sunday Laws.

Constitutionality of statute requiring the running of at least one regular passenger train each way over all railroad lines on Sunday. *State v. Chicago, B. & Q. R. Co.* (Mo.), 781.

"Every day," as used in statute in question, includes Sunday, and therefore railroad that fails to run any train over a line on Sunday is liable for the penalty prescribed for violation of such act. *State v. Chicago, B. & Q. R. Co.* (Mo.), 781.

Tobacco spit on car steps, duty of conductor to discover. *Hotenbrink v. Boston Elev. Ry. Co.* (Mass.), 750.

Vehicles.

Actionable negligence where car door closed upon passenger's hand after he had pushed it back in order to alight. *Kellogg v. Boston & M. R. R.* (Mass.), 613.

Warn and Instruct.

Conductor was not guilty of gross negligence in failing to act on the theory that passengers would violate rule, conspicuously posted, forbidding them to ride on car steps or platform, so as to warrant recovery under certain statute. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

Evidence sustained finding of negligence of motorman in not taking precautions for passenger's safety, either by removing the car's sand-plunger, or guarding it with his foot, or warning her of its presence. *Martin v. Old Colony St. Ry. Co.* (Mass.), 268.

Who Are Passengers.

Court properly submitted to jury whether plaintiff went to station a reasonable time before train time, so as to be entitled to the rights of a passenger. *Northern Pac. Ry. Co. v. Marinovich* (C. C. A.), 50.

One starting to board train with ticket in his possession. *St. Louis, etc., Ry. Co. v. Hutchinson* (Ark.), 596.

One while forcing his way into street car from its wrong side at unusual and improper place. *Geiger v. Pittsburgh Rys. Co.* (Pa.), 265.

Passenger struck by train from which he had just alighted. *Millett v. New York, etc., R. R.* (Mass.), 249.

Termination of relation caused by passenger's continuing to violate carrier's rule after being warned. *Renaud v. New York, etc., R. Co.* (Mass.), 632.

There was no such re-establishment of relation of passenger as would entitle one to damages for second ejection from train from which he had been ejected for refusal to pay fare and warned that he would not be allowed to re-enter it. *Phillips v. Atlantic C. L. R. Co.* (S. Car.), 566.

CHILDREN.

See LICENSEES.

Contributory Negligence.

Of mother, obliged to go to nearby market for something for

CHILDREN—Continued.

supper, in leaving her five year old child in charge of nine year old daughter on sidewalk, and the younger child was struck by street car. *Grant v. Bangor Ry., etc., Co. (Me.)*, 376.

Whether the degree of care which must be exercised by child for its own protection is question for jury. *Grant v. Bangor Ry., etc., Co. (Me.)*, 376.

Damages.

Measure of damages for loss or services of minor child. *Missouri, etc., Ry. Co. v. Horton (Okl.)*, 542.

Parent is entitled to more than nominal damages for death of son of seven years of age. *Golden v. Spokane & I. E. R. Co. (Idaho)*, 79.

Value of deceased child's services to father during period of his minority be ascertained by jury, how should. *Golden v. Spokane & I. E. R. Co. (Idaho)*, 79.

Verdict of \$4,000 for death of boy of seven years of age was not excessive. *Golden v. Spokane & I. E. R. Co. (Idaho)*, 79.

Discovered Peril.

Question whether engineer saw child in time to have prevented the injury was for jury. *Southern Ry. Co. v. Smith (Ala.)*, 385.

Master and Servant.

There was such implied acquiescence by plaintiff in the employment of his minor son as to relieve defendant railroad of any liability to plaintiff for injuries to the son while employed at hazardous work. *Mauck v. Southern Ry. Co. (Ky.)*, 369.

Trespassers.

Railroad owes child trespassing on its tracks no duty save to avoid injuring him after discovering his peril. *Southern Ry. Co. v. Smith (Ala.)*, 385.

Where boy a little over 10 years of age boarded car of elevated railway to steal ride, and the conductor ordered him to get off, shaking his fist at the same time; and the boy lost his balance or fell in attempting to jump off, the conduct of the conductor did not show a cause of action against the company. *Shelly v. Boston Elev. Ry. Co. (Mass.)*, 391.

COMMON CARRIERS.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; CONSTITUTIONAL LAW.

Agency.

Notice to transfer company employed by consignee to receive goods from carrier, of condition of the goods, was notice to consignee. *Rothchild Bros. v. Northern Pac. Ry. Co. (Wash.)*, 284.

Assignment of Cause of Action.

Assignment to plaintiff of claim by consignor for damages for delay in delivery of freight vested in him the right of shipper. *Texas Cent. R. Co. v. Hannay-Frerichs & Co. (Tex.)*, 640.

Burden of Proof.

Burden on carrier to prove that act of shipper caused loss of his goods, though he accompanied them. *St. Louis, etc., R. Co. v. Pape (Ark.)*, 732.

When on shipper. *St. Louis, etc., R. Co. v. Pape (Ark.)*, 732.

COMMON CARRIERS—Continued.**Conversion.**

Where shipper had directed quarantined stock to be shipped back from intermediate point he could not recover from the carrier for their conversion at such point. *Southern Ry. Co. v. Wallace* (Ala.), 649.

Where shipper refused to receive stock shipped back on account of quarantine, he could not recover as for a conversion of the stock at the original shipping point. *Southern Ry. Co. v. Wallace* (Ala.), 649.

Damages.

Interest on value of shipment, in action for delay in transportation of goods. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Tex.), 640.

Measure and elements of damages for negligence in failing to perform contract to deliver merry-go-round to certain place by certain day for specific purpose, where carrier had notice of urgency of shipment. *Ft. Smith & W. R. Co. v. Williams* (Okl.), 721.

Delay.

Burden was on defendant to show that the delay was not negligent, in action against carrier under statute in question, imposing penalty for delay in transportation. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Tex.), 640.

That shippers were notified by carrier of conditions which prevented delivery of shipments in usual time was no defense to action for penalty for delay in transportation, under Tex. Rev. St. 1895, art. 4496, as knowledge of existence of such facts would not be sufficient to charge shipper with notice of their effect on carrier. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Tex.), 640.

In action against carrier under statute imposing penalty for delay in transportation, evidence of any circumstances which contributed to produce the delay in spite of ordinary diligence on part of carrier was admissible to disprove negligence. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Tex.), 640.

Where carrier did not require prepayment of freight charges as authorized by statute, it waived prepayment, so that failure to prepay was not a defense to action under statute imposing penalty for delay in transportation. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Tex.), 640.

Delivery by Carrier.

Although it would have been negligence to deliver the goods in question in dangerous condition it was waived by consignee in accepting delivery with knowledge of the condition. *Rothchild Bros. v. Northern Pac. Ry. Co.* (Wash.), 284.

Excuses for nondelivery. *Southern Ry. Co. v. Wallace* (Ala.), 649. Goods in question had been fully delivered to the consignee and were not in possession of the railroad, either as carriers or warehouseman, although they were still in the car. *Rothchild Bros. v. Northern Pac. Ry. Co.* (Wash.), 284.

Fires.

If fire destroying car load of high proof spirits was of spontaneous origin caused by contact with the air the carrier was not liable therefor where, on delivery of the car to the assignee, it notified his agent that one of the barrels containing the

COMMON CARRIERS—Continued.

spirits was broken. *Rothchild Bros. v. Northern Pac. Ry. Co.* (Wash.), 284.

Liens.

Right of shipper, who is both consignor and consignee, to maintain against carrier an action ex contractu for value of goods consigned to carrier for shipment and not delivered, when carrier tenders the goods at destination in damaged condition, but refuses to deliver them unless shipper pays usual freight charges. *Wilensky v. Central of Georgia Ry. Co.* (Ga.), 1.

Limiting Liability.

Under interstate commerce act, any contract limiting liability of carrier of property transported in interstate commerce, in case of loss, to stated maximum amount is void. *St. Louis, etc., R. Co. v. Pape* (Ark.), 732.

Valuation of property shipped. *Cole v. Minneapolis, etc., Ry. Co.* (Minn.), 717.

Proximate Cause.

Negligence in carrying spirits with the barrel in broken condition was not proximate cause of fire destroying the spirits, which originated in some way after consignee had taken possession and when its agents were entering the car to remove the goods. *Rothchild Bros. v. Northern Pac. Ry. Co.* (Wash.), 284.

Sunday Laws.

Under Mo. Rev. St. 1899, § 2240, prohibiting labor on Sunday, but excepting works of necessity, carrying freight is a work of necessity. *State v. Chicago, B. & Q. R. Co.* (Mo.), 781.

CONCURRING NEGLIGENCE.

See FELLOW SERVANTS; RAILROADS IN STREETS.

CONNECTING CARRIERS.

See INTERSTATE COMMERCE.

Burden of Proof.

Proof of delivery of interstate shipment to initial carrier, and of failure to deliver the same to the consignee, raises a presumption of negligence, so as to give rise to the liability imposed by the Carmack amendment upon the initial carrier for any loss or damage caused en route and casts the burden of proof upon it to clear itself. *Galveston, etc., R. Co. v. Wallace* (U. S.), 272.

Refusal to Receive.

Initial carrier's duty to notify consignor of connecting carrier's refusal to receive freight. *Southern Ry. Co. v. Wallace* (Ala.), 649.

Terminal Companies.

Under the contract in question, appellee railroad company was a lessee of appellant terminal company, with right to use the terminal facilities subject to similar right by terminal company and other railroad companies; and cars transferred by the terminal company, as ordered by appellee, remained under latter's exclusive possession; and terminal company was not liable for any loss of goods while such cars were on its terminal facilities. *Chicago & A. R. Co. v. Peoria & P. U. Ry. Co.* (Ill.), 20.

CONSTITUTIONAL LAW.

See CARRIERS OF PASSENGERS; EMPLOYERS' LIABILITY ACTS; STREET RAILWAYS.

Carriers.

Texas Rev. St. 1895, art. 4496, imposing on railroad company penalty of 5 per cent. per month on value of shipment during its negligent detention in transportation, does not violate Tex. Const. art. 1, § 13, declaring that excessive fines should not be imposed, nor cruel and unusual punishment inflicted. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Tex.), 640.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS; CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; IMPUTED NEGLIGENCE; LICENSEES; MASTER AND SERVANT; RAILROADS IN STREETS; STREET RAILWAYS.

Instruction correctly charged on the effect of contributory negligence. *Winfrey v. Missouri, K. & T. R. Co.* (C. C. A.), 228.

Intoxicated person for his own safety, degree of care that must be exercised by. *Winfrey v. Missouri, K. & T. Ry. Co.* (C. C. A.), 228.

Rule as to the effect of contributory negligence has not been modified by the statute in question. *Winfrey v. Missouri, K. & T. Ry. Co.* (C. C. A.), 228.

When question for jury. *St. Louis, etc., Ry. Co. v. Hutchinson* (Ark.), 596.

CROSSINGS.

See ACCIDENTS ON TRACK; IMPUTED NEGLIGENCE; LICENSEES; STREET RAILWAYS.

Construction of Crossings.

In proceedings to condemn right of way for public canal across railroad right of way, through embankment, the company is not entitled to be awarded, as damages, the necessary expense of building bridge to carry its tracks over the canal. *Chicago, etc., Ry. Co. v. City of Minneapolis* (Minn.), 106.

Rule that railroad may be required to erect and maintain bridge to carry its tracks over street crossing extends to all cases where public safety, convenience, or welfare requires such bridge. *Chicago, etc., Ry. Co. v. City of Minneapolis* (Minn.), 106.

Under statute in question, a railroad is not obliged to keep highway at crossings in repair except for the purpose of travel and one using highway merely as play ground is not entitled to recover under such statute, for injury caused by defects therein. *Harris v. Boston & M. M. R.* (Mass.), 384.

Contributory Negligence.

Cannot be said as matter of law that motorman on approaching steam railroad crossing is justified in crossing at signal of watchman without himself exercising any caution to see whether train is approaching. *Cocke v. Des Moines City Ry. Co.* (Iowa), 488.

Degree of care that must be exercised by highway traveler to avoid being struck by train. *Kansas City So. Ry. Co. v. Drew* (Ark.), 480.

Fact that deceased, killed by train, was a man of prudent character, well acquainted with the crossing, and a few minutes

CROSSINGS—Continued.

- before the accident was conducting himself in a careful manner, is insufficient to sustain a finding that he actually looked and listened for approaching trains. *Parsons v. Syracuse, etc., R. Co. (N. Y.)*, 395.
- Failure to look and listen for trains as fatal want of ordinary care. *White v. Minneapolis, etc., Ry. Co. (Wis.)*, 96.
- Failure to see or hear an approaching train in plain sight or hearing is not excused by mere diversion of attention or absorption in thought. *White v. Minneapolis, etc., Ry. Co. (Wis.)*, 96.
- In action for death of one whose vehicles was struck by train, in nighttime, it was question for jury whether he was guilty of contributory negligence. *Parsons v. Syracuse, etc., R. Co. (N. Y.)*, 395.
- Of highway traveler was question for jury. *Kansas City So. Ry. Co. v. Drew (Ark.)*, 480.
- Of one struck by street car which he saw approaching before he attempted to drive across tracks. *Farris v. Boston Elev. Ry. Co. (Mass.)*, 511.
- Presumption that teamster knew of ordinance limiting speed of trains over the crossing. *Merwin v. Northern Pac. Ry. Co. (Wash.)*, 476.
- Question for jury where pedestrian was struck by car, which he had seen approaching, while he was attempting to cross street on crosswalk. *Kraut v. Public Service Ry. Co. (N. J.)*, 528.
- Question for jury whether teamster struck by train at street crossing was guilty of contributory negligence. *Merwin v. Northern Pac. Ry. Co. (Wash.)*, 476.
- Right of highway traveler to assume that trainmen will not move train over crossing without giving statutory signals. *Kansas City So. Ry. Co. v. Drew (Ark.)*, 480.
- Right of pedestrian on crosswalk to expect that motorman would respect his right to cross to the street first. *Kraut v. Public Service Ry. Co. (N. J.)*, 528.
- Teamster at street crossing was not chargeable with knowledge that train was approaching at excessive speed, because he had seen other trains run over the crossing at high speed. *Merwin v. Northern Pac. Ry. Co. (Wash.)*, 476.
- Teamster was not chargeable with knowledge that train was approaching street crossing at excessive speed, unless he had actual knowledge, or knew of such facts as would lead a reasonably prudent man to discover such negligence. *Merwin v. Northern Pac. Ry. Co. (Wash.)*, 476.
- Testimony of person as to his having performed his duty of looking, and listening for trains, yet did not see or hear a train, though one was in plain sight or hearing from his position, does not present a jury question. *White v. Minneapolis, etc., Ry. Co. (Wis.)*, 96.
- That railroad was negligent in running train against decedent at crossing would not make it liable if he were guilty of contributory negligence. *Louisville, etc., Ry. Co. v. Lyons (Ky.)*, 503.

Degree of Care.

- That must be exercised by trainmen to avoid injuring highway traveler. *Kansas City So. Ry. Co. v. Drew (Ark.)*, 480.

Intersections.

- Under Mich. Comp. Laws, § 6232, a company formed by the

CROSSINGS—Continued.

consolidation of two railroad companies owes no duty to an engineer to maintain the interlocking system required by the statute to be maintained at the intersection of railroads, to protect him against any other injuries than those due to collisions between train on the intersecting tracks. *Mellish v. Pere Marquette R. Co.* (Mich.), 203.

Mutual Rights and Duties.

Mutual obligations, rights and duties of railroads and highway travelers at public crossings. *Missouri, etc., Ry. Co. v. Horton* (Okl.), 542.

Railroad and highway traveler must use ordinary care at public crossing, the former to avoid inflicting injury and the latter to avoid being injured by train. *Kansas City So. Ry. Co. v. Drew* (Ark.), 480.

Negligence.

Question of negligence in operating train was for jury. *Kansas City So. Ry. Co. v. Drew* (Ark.), 480.

Presumption of Negligence.

Prima facie presumption arises that railroad was negligent, where it is shown that highway traveler was struck by train at public crossing. *Kansas City So. Ry. Co. v. Drew* (Ark.), 480.

Signals.

Evidence of persons in a position to hear whether street car gong was rung, that they did not hear it, is sufficient to take question to jury as to whether such warning was given. *Louisville Ry. Co. v. Sheehan's* (Ky.), 514.

Failure to give statutory train signals as actionable negligence. *Kansas City So. Ry. Co. v. Drew* (Ark.), 480.

Statutory requirement as to sounding of train bells and whistles at public highway crossing would not apply to railroad crossing over a private way. *Jones v. New York, etc., R. Co.* (Mass.), 392.

Though train failed to give crossing signals, yet, this not having been the proximate cause of the accident sued for, but a team, running away without a driver, having run into side of the train after its locomotive had passed such crossing, the railroad was not liable. *Sublett v. Mobile & O. Ry. Co.* (Ky.), 532.

Speed.

Motorman's duty to have his car under control when approaching crosswalk. *Kraut v. Public Service Ry. Co.* (N. J.), 528.

Question for jury whether street car was running at unreasonable speed when it struck person who had just alighted from another car. *Louisville Ry. Co. v. Sheehan's Adm'x* (Ky.), 514.

Street railway's duty to lessen speed of its cars at street crossings, and give notice of their approach. *Louisville Ry. Co. v. Sheehan's Adm'x* (Ky.), 514.

Stop, Look, and Listen.

Care required of highway travelers to discover approach of trains. *Smith's Adm'r v. Cincinnati, etc., Ry. Co.* (Ky.), 522.

Duty to look and listen for trains includes duty to see or hear approaching train, if one is in plain sight or hearing. *White v. Minneapolis, etc., Ry. Co.* (Wis.), 96.

CROSSINGS—Continued.

Must use senses of sight and hearing to right and left, for discovery of any train which may be in dangerous proximity.

White v. Minneapolis, etc., Ry. Co. (Wis.), 96.

One about to cross railroad track is not as matter of law negligent in failing to stop, look, and listen. *Cocke v. Des Moines City Ry. Co. (Iowa)*, 488.

Presumption that highway traveler was able to see and hear train if others no more favorably situated therefor did so without difficulty. *White v. Minneapolis, etc., Ry. Co. (Wis.)*, 96.

Question for jury whether person was guilty of contributory negligence in not looking for the train which struck him just before stepping on track. *Louisville, etc., Ry. Co. v. Lyons (Ky.)*, 503.

Rule as to looking and listening for trains, and seeing or hearing one in plain sight or hearing, is one of law, not of mere evidence. *White v. Minneapolis, etc., Ry. Co. (Wis.)*, 96.

Rule requiring highway traveler to see or hear train in dangerous proximity to crossing is not open to exception to varying notions of different persons as to when a train is in dangerous proximity to crossing. *White v. Minneapolis, etc., Ry. Co. (Wis.)*, 96.

DAMAGES.

See CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; PERSONAL INJURIES.

Excessive Verdict.

Where plaintiff was only entitled to nominal damages, but verdict for \$500 was awarded, judgment will be reversed on appeal, without option to accept reduced verdict in lieu of new trial. *Leek v. Northern Pac. Ry. Co. (Wash.)*, 36.

DEATH BY WRONGFUL ACT.

See CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS.

Contributory Negligence.

That decedent was guilty of contributory negligence precluding recovery for his death may be shown either by evidence of plaintiff or defendant. *Bouchillon v. Charleston & W. C. Ry. Co. (S. Car.)*, 134.

Where it appears from entire evidence that no other reasonable conclusion could be reached except that the death was the result of decedent's negligence concurring with that of defendant, and was proximate of cause of the death, the question is for the court. *Bouchillon v. Charleston & W. C. Ry. Co. (S. Car.)*, 134.

Damages.

Admissibility of certain evidence in regard to circumstances of deceased. *St. Louis, etc., Ry. Co. v. Hutchinson (Ark.)*, 596.

In action for death of railroad flagman, 30 years of age, with expectancy of 27 years, where jury rendered verdict in plaintiff's favor for \$3,000 only, such verdict cured error in omitting to charge on measure of damages. *St. Louis, etc., R. Co. v. McWhirter (Ky.)*, 164.

\$4,500 was not excessive verdict. *St. Louis, etc., Ry. Co. v. Hutchinson (Ark.)*, 596.

DEATH BY WRONGFUL ACT—Continued.

\$5,000 was not excessive verdict. *Louisville Ry. Co. v. Sheehan's* (Ky.), 514.

Release.

Contract in question was merely a covenant by plaintiff not to sue the S. railroad company, and was not a release of the claim for death of plaintiff's intestate. *Dardanelle & R. Ry. Co. v. Brigham* (Ark.), 192.

Review.

Where the evidence as to whether plaintiff's intestate went to sleep upon defendant's tracks was sharply conflicting, a verdict for plaintiff cannot be set aside as palpably against the evidence. *Cincinnati, etc., R. Co. v. Maysfield's Adm'r* (Ky.), 199.

DOGS.

See CARRIERS OF PASSENGERS.

EMINENT DOMAIN.**Public Use.**

Condemnation of land by railroad company under Rem. & Bal. Code, § 8738, to use earth thereof in raising grade of its railroad, involves public use. *Great Northern R. Co. v. Superior Court* (Wash.), 372.

EMPLOYERS' LIABILITY ACTS.**Application.**

Injury to sectionman, caused by his foreman suddenly stopping hand car on which they were riding, did not arise in operation of railroad trains, within statute in question. *Richey v. Cleveland, etc., R. Co.* (Ind.), 687.

"Managing" means to have under control and direction; and employees in charge of the stopping and starting of a train are "managing" it, within Mills' Ann. St. § 1508. *Whittle v. Denver & R. G. R. Co.* (Colo.), 178.

Mills' Ann. St., § 1508, makes railroad liable for death of passenger in a collision between trains, caused by an operator negligently failing to stop train for orders. *Whittle v. Denver & R. G. R. Co.* (Colo.), 178.

Provision of Georgia railroad employers' liability act of August 16, 1909, applied to case of employee who joined relief department of railroad company prior to passage of such act. *Washington v. Atlantic C. L. R. Co.* (Ga.), 140.

Section foreman, in suddenly stopping hand car on which he and his crew were riding, resulting in injury to one of the crew, was acting for the railroad within statute in question. *Richey v. Cleveland, etc., R. Co.* (Ind.), 687.

Statute in question did not change the fellow-servant rule, except as a fellow servant falls within the statute. *Richey v. Cleveland, etc., R. Co.* (Ind.), 687.

Statute in question, providing that acceptance of benefits by employee of railroad maintaining relief department shall not bar recovery for his injuries, is applicable to contract between employer and employee made before passage of such act. *Miller v. Atlantic C. L. R. Co.* (S. Car.), 657.

Under statute in question, railroad was liable for injuries to its employee walking near track, from being struck by backing

EMPLOYERS' LIABILITY ACTS—Continued.

train in charge of the rear brakeman who negligently failed to slow up or stop in time to avoid the injury. *Flaherty v. New York Cent., etc., R. Co. (Mass.)*, 311.

Constitutional Law.

Constitutionality of federal statute in question, which abrogates the fellow-servant rule, extends the employer's liability to cases of death, and restricts the defenses of contributory negligence and assumption of risk. *Mondou v. New York, etc., R. Co. (U. S.)*, 337.

Constitutionality of Georgia railroad employers' liability act of August 16, 1909, when applied to case of employee who joined relief department of railroad company prior to passage of such act. *Washington v. Atlantic C. L. R. Co. (Ga.)*, 140.

Constitutionality of S. Car. act March 7, 1905, providing that acceptance of benefits by injured employee of employer maintaining relief department shall not bar recovery for his injuries. *Miller v. Atlantic C. L. R. Co. (S. Car.)*, 657.

Federal Hours of Service Law is not unconstitutional because not limited in term to employees engaged in interstate commerce. *St. Louis, etc., R. Co. v. McWhirter (Ky.)*, 164.

Georgia railroad employers' liability act of August 16, 1909, is not violative of fourteenth amendment of Constitution of United States, on the ground that it abridged the privilege of defendant railroad to contract, or deprived it or its relief department of liberty of contract without due process of law. *Washington v. Atlantic C. L. R. Co. (Ga.)*, 140.

Validity and application of federal employers' liability act in question, which prevents acceptance of benefits under contract of membership in railway relief department from operating as bar to recovery of damages for injury or death of employee, and avoiding any agreement to that effect. *Philadelphia, etc., R. Co. v. Schubert (U. S.)*, 317.

Contributory Negligence.

Constitutionality and validity of Nebraska statute in question, under which contributory negligence of railway employee injured while engaged in train service will not bar recovery from the railroad company, where his negligence was slight and that of the company gross in comparison, etc. *Missouri P. R. Co. v. Ozro Castle (U. S.)*, 306.

S. Car. Const. art. 9, § 15, applies only to the defense of assumption of risk by railroad employee, and does not refer to question of his contributory negligence. *Bouchillon v. Charleston & W. C. Ry. Co. (S. Car.)*, 134.

Interstate Commerce.

Power of congress, in exercise of its power over interstate commerce, to regulate relations of railway carriers and their employees. *Mondou v. New York, etc., R. Co. (U. S.)*, 337.

Until Congress acted in the matter there was no repugnancy to the commerce clause of the Federal Constitution in the provisions of Neb. Comp. Stat. chap. 21, § 4, under which the contributory negligence of a railway employee injured while engaged in interstate commerce did not bar recovery from the company, etc. *Missouri P. R. Co. v. Ozro Castle (U. S.)*, 306.

Jurisdiction.

Enforcement of rights under act of Congress of April 22, 1908.

EMPLOYERS' LIABILITY ACTS—Continued.

cannot be regarded as impliedly restricted to the federal courts. *Mondou v. New York, etc., R. Co.* (U. S.), 337.

Federal Statute in question confers rights which may be enforced in state courts. *Atlantic C. L. R. Co. v. Whitney* (Fla.), 654.

Right of state court to refuse to enforce rights under federal act of April 22, 1908. *Mondou v. New York, etc., R. Co.* (U. S.), 337.

When interstate railroad fails to comply with federal statute fixing a standard of duty whereby an employee is injured, he may recover compensation for such injury in state court. *Atlantic C. L. R. Co. v. Whitney* (Fla.), 654.

S. Car. act Feb. 23, 1903, providing that acceptance of benefits by injured employee of railroad maintaining relief department shall not bar recovery by the employee of damages for the injury, is not impliedly repealed by certain statute. *Miller v. Atlantic C. L. R. Co.* (S. Car.), 657.

Statute of Indiana making corporations liable to employees for injury resulting from negligence of one to whose order the injured person was bound to and did conform is declaratory of the common law. *Richey v. Cleveland, etc., R. Co.* (Ind.), 687.

Statute Regulations Superseded.

The laws of the several state, in so far as they covered the same field, were superseded by enactment by Congress of the employers' liability act of April 22, 1908. *Mondou v. New York, etc., R. Co.* (U. S.), 337.

EVIDENCE.**Res Gestæ.**

Testimony as to statements made by engineer shortly after the accident, to the effect that he kept thinking the child would get off the track until it was too late. *Southern Ry. Co. v. Smith* (Ala.), 385.

FELLOW SERVANTS.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Concurring Negligence.

If railroad fireman was injured by concurring negligence of engineer, his fellow servant, and of others, who were not his fellow servants, he may recover against his company if it was responsible for the negligence of such others. *Louisville & N. R. Co. v. Moran* (Ky.), 325.

Who Are.

Negligent failure of engineer to obey rule for protection of trains operated on same track at stations is, as to another engineer injured in a collision in consequence thereof, the negligence of a fellow servant. *Mellish v. Pere Marquette R. Co.* (Mich.), 203.

Under Tennessee laws, railroad engineer and his fireman are fellow servants. *Louisville & N. R. Co. v. Moran* (Ky.), 325.

FIRES SET BY LOCOMOTIVES.**Combustibles on Right of Way.**

Instruction in question covered request to charge that if defend-

FIRES SET BY LOCOMOTIVES—Continued.

ant's right of way, at the place where the fire originated, was reasonably clear and free from combustible material, it was not negligent. *New York, etc., Ry. Co. v. Roper* (N. Y.), 548.

Damages.

Interest as part of damages recoverable by one whose property is negligently destroyed by railroad locomotive. *New York, etc., Ry. Co. v. Roper* (Ind.), 548.

Evidence.

As to another fire set by same locomotive within few minutes of when fire in question was set. *Austin v. Pennsylvania R. Co.* (N. J.), 558.

Evidence of the scattering of sparks generally by other of defendant's locomotives to show the general care exercised by it in equipping its locomotives. *Taffe v. Oregon R. & Nav. Co.* (Ore.), 130.

Evidence that on other occasions fire escaped from defendant's other engines. *Bradley v. Chicago, etc., R. Co.* (Neb.), 127.

Evidence sustained verdict against railroad. *St. Louis, etc., Ry. Co. v. Greeson* (Ark.), 123.

Evidence was sufficient to sustain verdict for plaintiff. *Currie & McQueen v. Seaboard A. L. Railway* (N. Car.), 116.

Firing of property from emission of sparks from locomotive may be proven by circumstantial evidence alone. *St. Louis, etc., Ry. Co. v. Greeson* (Ark.), 123.

Fuel.

Using lignite coal in locomotive, plaintiff had no just ground for complaint because of certain instruction in regard to negligence in. *Bradley v. Chicago, etc., R. Co.* (Neb.), 127.

It was not necessary for plaintiff to show that defendant railroad had knowledge or notice of the existence of the fire in question on its right of way, in order to charge it with liability for the destruction of plaintiff's house. *New York, etc., Ry. Co. v. Roper* (Ind.), 548.

Origin.

Circumstantial evidence in question was sufficient to warrant finding that the fire complained of was caused by certain locomotive. *New York, etc., Ry. Co. v. Roper* (Ind.), 548.

Pleading.

Complaint alleging negligence of railroad in that sparks from defendant's locomotive set fire to combustible material which defendant had negligently permitted to remain on its right of way, etc., sufficiently alleged negligence to repel a demurrer. *New York, etc., Ry. Co. v. Roper* (Ind.), 548.

Presumption of Negligence.

Burden of satisfying jury, in order to rebut the presumption of negligence created by plaintiff's evidence, that engine in question was properly equipped; that competent men were in charge of it; and that it was prudently operated, is upon defendant. *Currie & McQueen v. Seaboard A. L. Railway* (N. Car.), 116.

Question for jury where defendant's evidence tends to rebut the presumption of negligence created by plaintiff's evidence, by tending to show that the engine in question was properly equipped, was in charge of competent employees, and was prudently operated. *Currie & McQueen v. Seaboard A. L. Railway* (N. Car.), 116.

FIRES SET BY LOCOMOTIVES—Continued.

Rebuttal of presumption of negligence where prima facie case of negligence in starting right of way fire is made out against railroad. *Taffe v. Oregon R. & Nav. Co. (Ore.)*, 130. Where there is evidence to support finding for plaintiff as to origin of fire, nonsuit is properly refused. *Currie & McQueen v. Seaboard A. L. Railway (N. Car.)*, 116.

Spark Arresters.

Care required of railroad to equip its locomotives with effective spark arresters. *Bradley v. Chicago, etc., R. Co. (Neb.)*, 127. Question for jury whether the spark arresters and locomotive causing the fire were in good condition at that time. *Taffe v. Oregon R. & Nav. Co. (Ore.)*, 130.

Subrogation of Insurer.

Payment in question subrogated insurance company to the rights of insured against railroad company. *New York, etc., Ry. Co. v. Roper (Ind.)*, 548.

FOREIGN CORPORATIONS.

See PROCESS.

GAME.

See INTERSTATE COMMERCE.

GROSS NEGLIGENCE.

See CARRIERS OF PASSENGERS.

HUSBAND AND WIFE.

See PERSONAL INJURIES.

IMPUTED NEGLIGENCE.

See NEGLIGENCE.

One injured by a collision between street car and automobile, while riding in the latter with its owner who was driving, was chargeable with the contributory negligence of the owner. *Kneeshaw v. Detroit United Railway (Mich.)*, 492.

INDEPENDENT CONTRACTORS.**Who Are.**

General definitions, and particular illustrations, showing when one is, or is not, an independent contractor. *Johnson v. Carolina, etc., R. Co. (N. Car.)*, 701.

INJUNCTIONS.

See RAILWAYS.

INSOLVENCY.

See RECEIVERS.

INTEREST.

See COMMON CARRIERS.

INTERSTATE COMMERCE.

See COMMON CARRIERS; CONNECTING CARRIERS; EMPLOYERS' LIABILITY ACTS; TICKETS AND FARES.

Constitutional Law.

Validity of federal statute in question making initial carrier

INTERSTATE COMMERCE—Continued.

liable for loss any where en route, etc., in spite of any agreement limiting such carrier's liability to its own line. *Galveston, etc., R. Co. v. Wallace* (U. S.), 272.

Intoxicating Liquors.

Shipper seeking relief because of refusal of carrier to accept interstate shipments of intoxicating liquors consigned to dry points, which carrier seeks to justify under state statute, may invoke jurisdiction of courts without first applying to Interstate Commerce Commission. *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* (U. S.), 216.

Jurisdiction.

Damage caused by failure of connecting carrier in interstate shipment to deliver the goods to consignee, for which failure the initial carrier is made liable by the Carmack amendment of June 29, 1906, is not traceable to a violation of the statute, redress for which under § 9 of the original interstate commerce act, can only be had in proceeding before the Interstate Commerce Commission or in federal courts. *Galveston, etc., R. Co. v. Wallace* (U. S.), 272.

State court may enforce the liability of initial carrier, under the Carmack amendment, by which such carrier is made liable for loss beyond its own line. *Galveston, etc., R. Co. v. Wallace* (U. S.), 272.

"Lacey Act."

Where wild ducks, though legally taken and shipped from Arkansas to Illinois, were not packed and marked as required by the "Lacey Act," and by reason thereof were taken and confiscated by a game warden in Missouri, while waiting further transportation in a warehouse, shipper was not entitled to recover their value against the carrier. *Eager v. Jonesboro, etc., Express Co.* (Ark.), 276.

State Regulation.

Carrier incorporated under laws of Kentucky cannot justify its refusal to accept interstate shipments of intoxicating liquors, consigned to localities in that state where local-option prohibitory laws prevail, under a state statute. *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* (U. S.), 216.

Regulation by city of street railway operated by state corporation and which carried passengers only to the state line where they were delivered to foreign corporation, is not interference with interstate commerce. *South Covington & C. R. Co. v. City of Covington* (Ky.), 582.

Sunday Laws.

Statute requiring the running of at least one regular passenger train each way every day over all railroad lines is not invalid as a regulation of interstate commerce. *State v. Chicago, B. & Q. R. Co.* (Mo.), 781.

Violation of Act.

Mistaken date of expiration of ticket issued for interstate transportation of passenger. *Illinois Cent. R. Co. v. Fleming* (Ky.), 252.

What Is.

Shipment of dead game birds from one state to another is not interstate commerce in the full sense. *Eager v. Jonesboro, etc., Express Co.* (Ark.), 267.

INTOXICATING LIQUORS.

See INTERSTATE COMMERCE.

JUDICIAL NOTICE.

That coal is a necessity in the operation of steam railroads, and that elevator is of assistance in handling and shipping grain by railroads. *State v. Missouri Pac. Ry. Co.* (Mo.), 560.

JURISDICTION.

See EMPLOYERS' LIABILITY ACTS; INTERSTATE COMMERCE.

"LACEY ACT".

See INTERSTATE COMMERCE.

LEASES AND RUNNING POWERS.

See CONNECTING CARRIERS.

Where accident in which employee was injured occurred in Tennessee, the rights and liabilities of the parties are to be determined by the laws of that state. *Louisville & N. R. Co. v. Moran* (Ky.), 325.

LICENSEES.**Contributory Negligence.**

Licensee boarding lower tread of electric car with both hands full of bundles. *Otto v. Milwaukee N. Ry. Co.* (Wis.), 624.
Mere fact that one struck by train was walking too close to track when there was room enough to walk at safe distance. *Sanders v. Southern Railway* (S. Car.), 495.

Sleeping car company's employee's right to rely on custom of conductors of switching crews to notify him when cars were about to be moved, when he was on roof of sleeping car engaged in filling its water tank. *Kean v. New York, etc., R. Co.* (Mass.), 517.

Woman accompanying passengers was not negligent as matter of law in stepping on lower tread of electric car in order to enable her to place basket of clothes of one of such passengers on the car platform. *Otto v. Milwaukee N. Ry. Co.* (Wis.), 624.

Degree of Care.

Care due from trainmen to bare licensee using private crossing over tracks. *Jones v. New York, etc., R. Co.* (Mass.), 392.

Carrier operating electric cars is bound to use reasonable diligence to discover whether person accompanying passengers, who has stepped on car, has mounted platform or stepped to ground, before starting car. *Otto v. Milwaukee N. Ry. Co.* (Wis.), 624.

Due licensee on electric car as affected by fact that those in charge of car were not chargeable with knowledge of her perilous situation. *Otto v. Milwaukee N. Ry. Co.* (Wis.), 624.

Due one passing along railroad's right of way in switchyard under implied license used by the public generally. *Sanders v. Southern Railway* (S. Car.), 495.

Person boarding electric car to see relatives or friends off, care due to. *Otto v. Milwaukee N. Ry. Co.* (Wis.), 624.

Explosives.

Railroad is not required to anticipate the act of boys in carrying away a torpedo from its premises and exploding it, and

LICENSEES—Continued.

thereby injuring one of themselves. *Jacobs v. New York, etc., R. Co. (Mass.)*, 389.

Railroad, using dangerous explosives for torpedoes, must take every precaution to prevent personal injury to those rightfully upon its premises from explosions which might be caused through carelessness of its servants. *Jacobs v. New York, etc., R. Co. (Mass.)*, 389.

Lookouts.

Duty of railroad to lookout to avoid running trains against persons passing along its right of way in switchyard under an implied license extending to the public. *Sanders v. Southern Railway (S. Car.)*, 495.

Railroad must maintain lookout, give warning, and run train at reasonable speed, to protect licensee on its track. *Louisville, etc., Ry. Co. v. Lyons (Ky.)*, 503.

Who Are.

Implied license to public to pass along railroad's right of way in switchyard, what constituted. *Sanders v. Southern Railway (S. Car.)*, 495.

One not the owner of adjoining land, who undertakes to pass over railroad at private crossing for his own convenience. *Jones v. New York, etc., R. Co. (Mass.)*, 392.

Persons using the bridge and track of the crossing in question were licensees, not trespassers. *Louisville, etc., Ry. Co. v. Lyons (Ky.)*, 503.

MASTER AND SERVANT.

See CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; SLEEPING CAR COMPANIES.

Accidents on Track.

Railroad should not move its trains through yard in which its employees are constantly moving, and which is frequently used by them in going to and from their place of work, without a reasonable signal and a reasonable lookout. *Cincinnati, etc., R. Co. v. Mayfield's Adm'r (Ky.)*, 199.

Appliances.

Liability of master for injury to its employee on account of electricity in span wire from which trolley wires were suspended. *Doyle v. La Crosse City Ry. Co. (Wis.)*, 676.

Liability of master on account of electricity in span wire, through defective insulation in hangers by which trolley wires were suspended therefrom. *Doyle v. La Crosse City Ry. Co. (Wis.)*, 676.

Assaults.

If, in the line of his duty, brakeman shoots trespasser in ejecting him, the railroad is liable. *St. Louis S. W. Ry. Co. v. Mitchell (Ark.)*, 82.

Assumption of Risk.

Brakeman, who at night acted as lookout on car which was being pushed by engine over single track logging railway, where he knew loaded cars were left without any system of lights or warning, assumed risk of injury from collision with such a car. *Ingersoll v. Detroit & M. Ry. Co. (Mich.)*, 682.

MASTER AND SERVANT—Continued.

Engineer, fully acquainted with dangers attending use of train signal system adopted by his railroad, assumes the risk.

Mellish v. Pere Marquette R. Co. (Mich.), 203.

Fireman of switching engine, injured because box car was kicked upon side track, and so close to main track that cab of such engine cleared its corner by only from three to six inches. *Mackenzie v. New York Cent., etc., R. Co.* (Mass.), 314.

Fireman on switching engine at freight yard does not assume risk of negligence of conductor in charge of the work. *Mackenzie v. New York Cent., etc., R. Co.* (Mass.), 314.

In railroad employee's action for injuries from being struck by backing train while he was walking alongside spur track, burden was on defendant railroad to show plaintiff appreciated the risk and assumed it. *Flaherty v. New York Cent., etc., R. Co.* (Mass.), 311.

Railroad employee while walking alongside spur track, in going from his day's work to return his tools and make his daily report, does not assume risk of being struck by backing train approaching him from rear without giving customary warning signal. *Flaherty v. New York Cent., etc., R. Co.* (Mass.), 311.

Collisions.

Defendant's engineer was not negligent in using main track of other company for switching while its local freight train was in the yard in question, so as to make defendant liable for death of its fireman by collision of its train while switching on main track with such local freight train of the other company. *Dardanelle & Ry. Co. v. Brigham* (Ark.), 192.

Evidence sustained finding that earlier signals from deceased fireman's engineer might have attracted attention of engineer of other train. *Dardanelle & R. Ry. Co. v. Brigham* (Ark.), 192.

If engineer of defendant's train discovered approaching train of other company in time to have avoided the collision by giving proper stop signal to other engine, or warn his fireman, who was then shoveling coal, to enable latter to escape, his failure to do either would be negligence, making defendant liable for such fireman's death in the resulting collision. *Dardanelle & R. Ry. Co. v. Brigham* (Ark.), 192.

In maintaining and operating spur track used merely to take timber out of sparsely settled country and over which no regular trains are run, railroad company is not required to protect standing cars by lights or watchmen. *Ingersoll v. Detroit & M. Ry. Co.* (Mich.), 682.

Concurring Negligence.

Negligence of engineer, in ordering flagman to throw switch, after he had worked longer than 16 consecutive hours, in violation of federal statute in question, was a cause of his death, concurring with negligence of the railroad in violating such statute, for either of which causes the latter was liable. *St. Louis, etc., R. Co. v. McWhirter* (Ky.), 164.

Contributory Negligence.

Duty of railroad employee riding on top of freight car on spur track running into saw-mill and yard to discover that there are telephone wires over the track with which he may come in contact. *Meyers v. Detroit & C. R. Co.* (Mich.), 153.

MASTER AND SERVANT—Continued.

It could not be said, as matter of law, that employee was negligent in failing to make constant inspection to ascertain that the location of the plank on which he was working, which was struck by passing train, had not changed. *McLellan v. Boston & M. R. R.* (Mass.), 354.

Railroad employee assuming perilous position in ignorance of the existence of the danger. *Meyers v. Detroit & C. R. Co.* (Mich.), 153.

Railroad employee riding on top of freight car on spur track running into saw-mill and yard need not anticipate that in stringing wires over railroad track the law fixing minimum height of wires had been violated. *Meyers v. Detroit & C. R. Co.* (Mich.), 153.

Railroad employee walking in dangerous path alongside of railroad, when struck by train. *Flaherty v. New York Cent., etc., R. Co.* (Mass.), 311.

There can be no recovery by servant, injured while operating, with others, a defective car, unless the injury was caused solely by the condition of the car, and not by the excessive speed with which it was operated. *Cheichi v. Northern Pac. Ry. Co.* (Wash.), 159.

Track repairer killed by derailment of engine, while riding on it in violation of rule requiring him to ride on shanty car. *Bouchillon v. Charleston & W. C. Ry. Co.* (S. Car.), 134.

Trainmen cannot recover for injuries resulting from their disobedience of rules allowing trainmen to proceed only upon the giving of safety signals, and to stop upon seeing danger signals. *Louisville & N. R. Co. v. Moran* (Ky.), 325.

Violation of rule by injured engineer. *Jones v. Pere Marquette R. Co.* (Mich.), 665.

Degree of Care.

Master is not an insurer of his servant's safety. *Baltimore & O. R. Co. v. Wilson* (Md.), 361.

Dispatching Trains.

Bulletin directing all trains to use right-hand track applied to a light engine. *Jones v. Pere Marquette R. Co.* (Mich.), 665.

Train dispatcher was not guilty of negligence because he had right to assume that other servants of the railroad would observe rules for routing of trains. *Jones v. Pere Marquette R. Co.* (Mich.), 665.

Evidence.

In action by street car conductor against his company for injuries claimed to have resulted from train dispatcher's negligence in directing plaintiff to run to S. switch, without directing other conductor to hold his car there, in view of the system adopted for transmitting train orders, all persons, including defendant's employees, could testify as to what they heard when plaintiff was repeating back train orders over a telephone, as part of the transaction. *Meade v. Detroit, etc., Railway* (Mich.), 84.

Hours of Labor.

U. S. Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416, is mandatory, so that where flagman was killed, after he had been compelled to work more than 16 hours, in violation of such act, the continuance of his employment for longer period than 16

MASTER AND SERVANT—Continued.

hours was negligence per se on part of railroad, and was proximate cause of his death. *St. Louis, etc., R. Co. v. McWhirter* (Ky.), 164.

Leases and Running Powers.

Defendant, when using the tracks of the other company under the agreement in question, was not liable for injuries to its own trainmen caused by the other company's negligence. *Dardanelle & R. Ry. Co. v. Brigham* (Ark.), 192.

Limiting Liability.

Question for jury whether sleeping car company's employee's signature to his contract of employment was procured by fraud. *Kean v. New York, etc., R. Co.* (Mass.), 517.

Nonassignable Duties.

Master's duty in respect to providing servant safe place to work cannot be delegated. *Baltimore & O. R. Co. v. Wilson* (Md.), 361.

Railroad employing contractor in the construction of a bridge cannot escape liability for injuries to servant, caused by collapse of bridge, on the ground that it relied upon fellow servant to see that the place in which the injured servant was required to work was reasonably safe. *Baltimore & O. R. Co. v. Wilson* (Md.), 361.

Presumption of Negligence.

In action for injury to defendant railroad's employee, the doctrine of *res ipsa loquitur* did not apply, so as to make the falling of the bridge in question *prima facie* evidence of negligence on the part of defendant. *Baltimore & O. R. Co. v. Wilson* (Md.), 361.

Proximate Cause.

Engineer's negligence in proceeding before a white light was displayed at drawbridge in question was proximate cause of injury to his fireman. *Louisville & N. R. Co. v. Moran* (Ky.), 325.

Rules.

Abrogation of rule of railroad, violation of which was made criminal offence by statute, unreported violations of it by engineers was not an. *Jones v. Pere Marquette R. Co.* (Mich.), 665.

Construction of rule of railroad is question for court. *Jones v. Pere Marquette R. Co.* (Mich.), 665.

Railroad, as an employer, was not guilty of actionable negligence in permitting its locomotives to take fuel and water without providing for other warnings to approaching trains than those in question. *Mellish v. Pere Marquette R. Co.* (Mich.), 203.

Scope of Employment.

Evidence sustained finding that brakeman shot plaintiff, in ejecting him from train, in line of his duty. *St. Louis, S. W. Ry. Co. v. Mitchell* (Ark.), 82.

Servant's Liability.

Engineer is not personally liable for injuries to third person resulting from defects in locomotive which his company furnished him and required him to run. *Haynes' Adm'rs v. Cincinnati, etc., R. Co.* (Ky.), 181.

MASTER AND SERVANT—Continued.

In action against railroad company and one of its engineers for death of fireman by boiler explosion, evidence did not show any negligence by engineer. *Haynes' Adm'rs v. Cincinnati, etc., R. Co. (Ky.)*, 181.

Servant is liable for injuries to third person caused by his non-feasance, as well as those caused by his misfeasance. *Haynes' Adm'rs v. Cincinnati, etc., R. Co. (Ky.)*, 181.

Speed.

Operation of work train at high rate of speed on straight track supposed to be in good condition is not such willfulness as will justify punitive damages for death of employee on the train, killed by derailment of engines caused by low joint in rails, when is. *Bouchillon v. Charleston & W. C. Ry. Co. (S. Car.)*, 134.

Who Are Employees.

Employee of independent contractor assisting railroad's engineer did not thereby become a servant of the railroad. *McLellan v. Boston & M. R. R. (Mass.)*, 354.

Work Place.

Master is bound to provide reasonably safe place for servant to work in. *Baltimore & O. R. Co. v. Wilson (Md.)*, 361.

MONOPOLIES.**Terminal Systems.**

Adequate relief from a combination of terminal facilities which offends against the Sherman anti-trust act, what constitutes. *United States v. Terminal R. Ass'n (U. S.)*, 290.

Mere combining of several independent railway terminal systems into one does not necessarily operate as a forbidden restraint, under the Sherman anti-trust act upon the interstate commerce which must use them. *United States v. Terminal R. Ass'n (U. S.)*, 290.

When is a combination of several independent railway terminal systems into one a violation of the Sherman anti-trust act. *United States v. Terminal R. Ass'n (U. S.)*, 290.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; COMMON CARRIERS; CONTRIBUTORY NEGLIGENCE; CROSSINGS; FELLOW SERVANTS; IMPUTED NEGLIGENCE; LICENSEES; MASTER AND SERVANT; PHYSICIANS AND SURGEONS; RAILROADS IN STREETS; STREET RAILWAYS; TRESPASSERS.

Actionable Negligence.

One is liable for injuries resulting from his failure to perform a duty to the person injured through negligence, inattention, or willfulness. *Haynes' Adm'rs v. Cincinnati, etc., R. Co. (Ky.)*, 181.

Degree of Care.

Care required of one handling electricity. *Doyle v. La Crosse City Ry. Co. (Wis.)*, 676.

Definitions.

Misfeasance, what constitutes. *Haynes' Adm'rs v. Cincinnati, etc., R. Co. (Ky.)*, 181.

NEGLIGENCE—Continued.

Nonfeasance, what constitutes. *Haynes' Adm'rs v. Cincinnati, etc., R. Co. (Ky.)*, 181.

What constitutes negligence. *Thompson v. Chicago, etc., Ry. Co. (C. C. A.)*, 570.

Imputed Negligence.

Negligence of one common carrier upon whose conveyance passenger is injured cannot be imputed to the passenger so as to bar recovery against another carrier, where the injury results from their concurrent negligence. *Galloway v. Detroit United Railway (Mich.)*, 580.

Last Clear Chance.

Error to charge jury that plaintiff may recover, notwithstanding his contributory negligence, if defendant failed to exercise reasonable care to avoid the injury after it discovered, or by exercise of reasonable care might have discovered, that an accident was imminent. *Oklahoma City Ry. Co. v. Barkett (Okla.)*, 87.

Presumption of Negligence.

General statement of doctrine in question. *Carney v. Boston Elev. Ry. (Mass.)*, 225.

Where plaintiff, while riding as passenger on open surface street car looked up as elevated train passed overhead, and was struck in eye by spark from the elevated railroad, probably from the contact shoe of the train. *Carney v. Boston Elevated Ry. (Mass.)*, 225.

NUISANCES.**What Are.**

Railroad lawfully using its property when operating within scope of its powers. *St. Louis & S. F. R. Co. v. Burrous (Okla.)*, 63.

Stagnant pool upon natural watercourse, formed by water used by railroad for bathing its employees and washing its locomotives by means of facilities connected with its roundhouse, and other water naturally flowing into such water course, gathering in a depression and flowing on land of third person about four blocks from the place the water from the round house emptied into the watercourse, where railroad was free from negligence or malice and used due care in erection and use of such facilities. *St. Louis & S. F. R. Co. v. Burrous (Okla.)*, 63.

ORDINANCES.

See STREET RAILWAYS.

PARENT AND CHILD.

See CHILDREN.

PASSES.

See TICKETS AND FARES.

PERSONAL INJURIES.**Damages.**

Loss of earning power and medical expenses where her husband paid for the treatment of her injuries, married woman's right to recover for. *Otto v. Milwaukee N. Ry. Co. (Wis.)*, 624.

PERSONAL INJURIES—Continued.

\$2,000 was not excessive verdict. *Kansas City So. Ry. Co. v. Drew* (Ark.), 480.

Notice to railroad of injury for which it is claimed it is responsible sufficiency of, under certain statute. *Thorson v. Groton, etc., Ry. Co.* (Conn.), 592.

PHYSICIANS AND SURGEONS.

Malpractice of its surgeon, liability of railroad on account of. *Atlantic C. L. R. Co. v. Whitney* (Fla.), 654.

POLICE POWER.

See STREET RAILWAYS.

PROCESS.

Service on the Assistant Secretary of State of Louisiana of process, in an action against a foreign railroad corporation which had not named an agent on whom process might be served, is not the equivalent of service on the Secretary of State within Act No. 54 of 1904 of Louisiana. *Simon v. Southern Ry. Co.* (C. C. A.), 397.

RAILROAD COMMISSIONS.**Orders.**

Anything railroad is ordered to do by railroad commission must be within the purpose for which the railroad was chartered. *Mississippi R. R. Commission v. Yazoo & V. M. R. Co.* (Miss.), 728.

Validity of order of State Railroad Commission requiring two railroad companies to make physical connection at certain point. *Mississippi R. R. Commission v. Yazoo & M. V. R. Co.* (Miss.), 728.

RAILROADS.

See JUDICIAL NOTICE; MONOPOLIES; PHYSICIANS AND SURGEONS; PROCESS; RECEIVERS.

Ultra Vires.

Power of railroad to purchase stock in other corporations to enable it to carry out certain purposes impliedly authorized by its charter. *State v. Missouri Pac. Ry. Co.* (Mo.), 560.

RAILROADS IN STREETS.**Concurrent Negligence.**

Prevented recovery where train was run at excessive speed and person struck by it was guilty of contributory negligence. *Smith's Adm'r v. Cincinnati, etc., Ry. Co.* (Ky.), 522.

Care required of deaf person to discover approach of train. *Smith's Adm'r v. Cincinnati, etc., Ry. Co.* (Ky.), 522.

Lookouts.

Duty to maintain on train. *Smith's Adm'r v. Cincinnati, etc., Ry. Co.* (Ky.), 522.

Obstructions.

In action by one injured while crossing railroad track, the question whether there was a defect in the way was for jury. *Harris v. Boston & M. R. R.* (Mass.), 384.

Where railroad tracks were lawfully across street, they did not

RAILROADS IN STREETS—Continued.

constitute a defect for which it was liable, merely because they were obstacles to travel. *Harris v. Boston & M. R. R.* (Mass.), 384.

Signals.

Duty to give train signals. *Smith's Adm'r v. Cincinnati, etc., Ry. Co.* (Ky.), 522.

Speed.

Actionable negligence to run train at 40 miles an hour. *Smith's Adm'r v. Cincinnati, etc., Ry. Co.* (Ky.), 522.

RECEIVERS.

Bondholder when not estopped from denying power of court to order issuance of receivers' certificates to pay overdue interest on mortgage bonds in order to prevent foreclosure of railroad mortgage. *Knickerbocker Trust Co. v. Oneonta, etc., Ry. Co.* (N. Y.), 67.

Persons purchasing receivers' certificates, which were made a paramount lien on railroad's property, were bound to take notice of the authority or want of authority to issue them. *Knickerbocker Trust Co. v. Oneonta, etc., Ry. Co.* (N. Y.), 67.

Power to issue receivers' certificates. *Knickerbocker Trust Co. v. Oneonta, etc., Ry. Co.* (N. Y.), 67.

RELEASE.

See DEATH BY WRONGFUL ACT.

RELIEF DEPARTMENT.

See EMPLOYERS' LIABILITY ACTS.

RULES.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

"SHERMAN ANTI-TRUST ACT."

See MONOPOLIES.

SLEEPING CAR COMPANIES.

See BAGGAGE; LICENSEES.

Limiting Liability.

Release in question inured to benefit of defendant railroad, and was a defense to action by employee of sleeping car company against the railroad, which was transporting sleeping car upon which he was engaged, for injuries sustained by him through negligence of railroad's employees. *Kean v. New York, etc., R. Co.* (Mass.), 517.

STATIONS AND DEPOTS.**Accidents on Track.**

Railroad must anticipate presence of prospective passengers upon its station premises when a train is arriving, and use ordinary care for their safety. *St. Louis, etc., Ry. Co. v. Hutchinson* (Ark.), 596.

Exclusion of Persons.

Defenses to action for damages on account of issuance of letter, notifying local shippers that defendant railway company will

STATIONS AND DEPOTS—Continued.

refuse to allow plaintiff to haul or handle any more freight from its depot, and to secure another drayman. *Chicago, etc., Ry. Co. v. Armstrong* (Okl.), 758.

What persons railroad may exclude from its depots and ware-rooms. *Chicago, etc., Ry. Co. v. Armstrong* (Okl.), 758.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CROSSINGS; IMPUTED NEGLIGENCE; INTER-STATE COMMERCE; LICENSEES; RAILROADS IN STREETS.

Accidents on Track.

Negligence was question for jury, though defendant railway's witnesses testified that plaintiff's wagon ran into the car. *Morrissey v. Boston Elevated Ry. Co.* (Mass.), 520.

Contributory Negligence.

Driver of automobile was guilty of contributory negligence, in running it against street car, barring recovery. *Kneeshaw v. Detroit United Railway* (Mich.), 492.

Duty of one on street car track to get out of the way of cars. *Mallett v. Seattle, etc., Ry. Co.* (Wash.), 538.

Of pedestrian, in attempting to cross track in front of car which he saw approaching, was question for jury. *Marple v. Topeka Ry. Co.* (Kan.), 90.

One walking on street car track in city is not required to use the same degree of care as if upon a private way, or upon steam railroad. *Mallett v. Seattle, etc., Ry. Co.* (Wash.), 538.

Right of driver of team moving ahead of slowly moving street car to assume that its motorman would sound the gong before changing the course of the car and crossing the path of his team. *Morrissey v. Boston Elevated Ry. Co.* (Mass.), 520.

Right to cross track in front of car which pedestrian sees approaching. *Marple v. Topeka Ry. Co.* (Kan.), 90.

Rule relieving one placed in position of sudden peril from the charge of negligence for taking the wrong course had no application where driver of automobile ran it into street car. *Kneeshaw v. Detroit United Railway* (Mich.), 492.

Whether negligent as matter of law to attempt to pass over public crossing in street, where cars usually stop, in front of approaching car. *Marple v. Topeka Ry. Co.* (Kan.), 90.

Injunctions.

Court of equity will restrain city authorities from ousting street railway company by destroying its property and business without compensation, when will. *Omaha, etc., Ry. Co. v. City of Omaha* (Neb.), 72.

Last Clear Chance.

Last clear chance doctrine was not applicable, as the motorman could assume that driver of wagon would not put himself in place of danger; and until he saw that such driver was in place of danger he was under no duty to stop his car. *Winn v. Union R. Co.* (R. I.), 535.

Motorman of car which was run into by automobile was not negligent for failure to avert the collision. *Kneeshaw v. Detroit United Ry.* (Mich.), 492.

STREET RAILWAYS—Continued.**Lookouts.**

Street railway must at all times and places keep lookout ahead for persons upon tracks. *Louisville Ry. Co. v. Sheehan's Adm'x* (Ky.), 514.

Mutual Rights.

Mutual rights and duties of street railways and other users of streets. *Farris v. Boston Elev. Ry. Co.* (Mass.), 511.

Mutual rights of street railways and other users of streets. *Kraut v. Public Service Ry. Co.* (N. J.), 528.

Police Power.

City cannot contract away its police power over street railways. *South Covington & C. R. Co. v. City of Covington* (Ky.), 582.

Ordinance providing that company shall not allow more than certain number of passengers on its cars is not unreasonable because it provides no method of preventing passengers from congregating on the platforms from choice. *South Covington & C. R. Co. v. City of Covington* (Ky.), 582.

Overcrowding and providing for disinfection of street cars, authority of general council to pass ordinance to prevent. *South Covington, etc., R. Co. v. City of Covington* (Ky.), 582.

Reasonableness of ordinance requiring street car companies to operate cars in sufficient numbers to reasonably accommodate the public. *South Covington & C. R. Co. v. City of Covington* (Ky.), 582.

Reasonableness of ordinance requiring weekly fumigation of street cars, and that they be kept at a certain temperature. *South Covington & C. R. Co. v. City of Covington* (Ky.), 582.

Signals.

Motorman is required, in exercise of ordinary care, to give timely alarm to warn pedestrian on track of approach of car. *Mallett v. Seattle, etc., Ry. Co.* (Wash.), 538.

Speed.

Duty to so control cars at all times as to protect persons upon tracks. *Louisville Ry. Co. v. Sheehan's Adm'x* (Ky.), 514.

Evidence showed that motorman was negligent in failing to reduce speed of car and having it under control before child was struck by it. *Grant v. Bangor Ry., etc., Co.* (Me.), 376.

Question for jury whether motorman made proper effort to prevent collision with pedestrian at crosswalk, or whether his inability to stop his car was due to its unlawful speed. *Kraut v. Public Service Ry. Co.* (N. J.), 528.

STREETS AND HIGHWAYS.

See RAILROADS IN STREETS.

SUMMONS.

See PROCESS.

SUNDAY LAWS.

See CARRIERS OF PASSENGERS; COMMON CARRIERS.

TICKETS AND FARES.

See INTERSTATE COMMERCE.

Contracts.

As between the passenger and the conductor of the train, the

TICKETS AND FARES—Continued.

ticket is considered as evidence of the passenger's rights. *Illinois Cent. R. Co. v. Fleming* (Ky.), 252.

Nature of railroad passenger ticket, what is the. *Illinois Cent. R. Co. v. Fleming* (Ky.), 252.

Passes.

Failure of railroad company to perform agreement to give annual passes to persons conveying land to it does not give rise to any cause of action in favor of grantors, where performance was prevented by Commerce Act June 29, 1906. *Cowley v. Northern Pac. Ry. Co.* (Wash.), 210.

Performance of contract by which railroad, in consideration of conveyance of land to it, agrees to give annual passes to grantors during their lifetime, made prior to Commerce Act June 29, 1906, is forbidden by section 6 of that act. *Cowley v. Northern Pac. Ry. Co.* (Wash.), 210.

Where agreement by railroad, in consideration of conveyance of land to it, to give annual passes over its lines to the grantors was performed by it until its further performance was prevented by Commerce Act June 29, 1906, and in mean time the land had greatly increased in value, a rescission of the contract for failure to perform should not be granted. *Cowley v. Northern Pac. Ry. Co.* (Wash.), 210.

TRESPASSERS.

See CHILDREN; LICENSEES; MASTER AND SERVANT.

Degree of Care.

Only duty railroad owes to trespasser on track is not to willfully or wantonly run over him or not to negligently do so after discovering his peril. *Rice v. Southern Ry. Co.* (Ala.), 501.

Railroad only owes to trespasser on its track the duty of exercising ordinary care to prevent injuring him after discovering his peril. *Louisville, etc., Ry. Co. v. Lyons* (Ky.), 503.

TRUSTS.

See MONOPOLIES.

ULTRA VIRES.

See RAILROADS.

WATER AND WATERCOURSES.

See NUISANCES.

WHAT LAW GOVERNS.

See LEX LOCI.

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